Supreme Court, U.S.
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No. 02-766 NOV 15 2002

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In The

Supreme Court of the United States

LORA LEE ZAIONTZ,

Petitioner,

vs.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a long line of cases, this Court has zealously maintained a "miscarriage of justice" ('MOJ') exception to the various procedural defenses to habeas relief that the government may assert in a criminal case.[1] Focusing on language in *Schlup v. Delo* (1995) 513 U.S. 298, 327-328, the Fifth Circuit Court of Appeals ruled that a showing of innocence, as defined under the *Jackson v. Virginia* (1979) 443 U.S. 307, 324, and *In re Winship* (1970) 397 U.S. 358 standards, did not qualify as a miscarriage of justice because it did not rely on evidence beyond the four corners of the trial record and because such a showing, even if true, demonstrated only a type of "legal" innocence, rather than the sort of "actual" or "factual" innocence purportedly required by the MOJ exception.

Therefore, the following questions arise:

(1) The Fifth Circuit Court of Appeals says that a conviction on insufficient evidence is not a "miscarriage of justice". Is that true?

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[1] E.g., *Kuhlman v. Wilson*, 477 U.S. 436, 455, 91 L.Ed.2d 364, 106 S.Ct. 2616 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986) [constitutional error]; *McClesky v. Zant*, 499 U.S. 467, 494-495, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991) [MOJ exception applied to procedural default]; *Sawyer v. Whitley*, 505 U.S. 333, 347, 120 L.Ed.2d 269, 112 S.Ct. 2514 (1992) [MOJ exception applied to death penalty]; *Schlup v. Delo*, 513 U.S. 298, 330-332, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995) [MOJ exception through an extra record showing]; *Bousley v. U.S.*, 523 U.S. 614, 617, 623-624, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998) [MOJ exception applied to insufficiency of the evidence].

QUESTIONS PRESENTED FOR REVIEW – Continued

Subsidiary questions are:

(2) Does the MOJ exception apply only to "actual" or "factual" innocence – as opposed to "legal" innocence? What do these terms include and exclude? Under which term would one class a showing of innocence by virtue of the insufficiency of the evidence?

(3) Does the MOJ exception require a showing of evidence outside the four comers of the record on appeal?

(4) Do the prudential underpinnings of the MOJ exception support application to a belated demonstration of insufficiency of the evidence?

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Lora Lee Zaiontz v. Janie Cockrell (5th Cir. 8/19/02) Case No. 02-40382.

Lora Lee Zaiontz v. Janie Cockrell (2/7/02) U.S. District Court for the So. District of Texas Corpus Christi Division, C.A. No. C-01-CV-0172.

Ex Parte Zaiontz (Texas Appellate Court) Appl. No. 29,570-01.

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JURISDICTION

The Supreme Court has jurisdiction, via certiorari, under Title 28 of the United States Code, section 1254(1) to review circuit court denials of applications under Title 28 of the United States Code (U.S.C.) section 2253 for certificates of appealability. (*Hohn v. United States,* 524 U.S. 236, 238-239, 252, 141 L.Ed.2d 242, 118 S.Ct. 1969 (1998).

The basis for the Fifth Circuit Court of Appeal's jurisdiction in this case was 28 U.S.C. sections 1291 and 2253.

The District Court had jurisdiction under 28 U.S.C. sections 2241 through 2254.

On August 19, 2002, the United States Court of Appeals for the Fifth Circuit, filed an order denying Petitioner's request under 28 U.S.C. section 2253 for a

certificate of appealability (hereinafter "COA"). (Appendix 'A'.) Petitioner did not file for a rehearing.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

28 U.S.C. section 2253 – *Appeal*:

> "(a) In a habeas corpus proceeding . . . , the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> . . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or. . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

U.S. Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, Amendment XIV:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Constitution, Article I, section 9, clause 2:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

STATEMENT OF THE CASE

On February 14, 1985, a jury found Petitioner guilty of capital murder in Cause No. 784-CR-1022-A, styled *The State of Texas v. Lora Lee Zaiontz*, in the 28th Judicial District Court of Nueces County, Texas. The trial court sentenced Petitioner to life imprisonment in what is now the Texas Department of Criminal Justice, Institutional Division. Zaiontz appealed, and on May 1, 1986, the Thirteenth Court of Appeals affirmed her conviction.

On August 17, 1995, Zaiontz filed a state application for writ of habeas corpus challenging her capital murder conviction. On October 18, 1995, the Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing.

The federal habeas petition which gives rise to this petition for certiorari was filed on April 6, 2001. (See Appendix 'I', the federal petition.) These facts are drawn

from an Order of the District Court. (See Appendix 'F', pp. 45-47.)

The federal petition presented three grounds for relief, the most important, for this analysis, being Ground #1.

> "*Ground 1*: Petitioner's 14th Amendment right to due process was violated by her conviction on evidence insufficient to establish that she had the state of mind requisite to capital murder under Texas law." *Facts Supporting Ground #1* (as alleged in the federal petition): "(1) In order to prove Capital Murder under Texas Penal Code sections 7.02(a)(2) and 19.03(a)(2), the State had to prove beyond a reasonable doubt that Petitioner both knew of the intent of Troy Kunkle (the shooter) to kill the victim and that she acted with intent to promote or assist the commission of the offense by encouraging, directing, aiding or attempting to aid Troy in the shooting. The jury was so instructed. (2) No rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found that the requisite intent had been proved beyond a reasonable doubt. (3) The evidence the State presented regarding Petitioner's intent and state of mind was, at best, to the effect that she was a knowing and willing participant in robbery; that she expected the victim to survive the robbery and took action to prevent him from being able to later recognize her; that she had her hand in the line of fire when the victim was shot; that all the relevant discussions of the day were about robbing people; that none of said discussions involved shooting or killing anyone; that two of her male accomplices had robbed a man without shooting him earlier that day; that the person who was armed at the time Petitioner invited the

> victim into the car refused to shoot him – even though the victim himself [who was despondent] invited him to do so; that no one expected Troy to grab the gun; that Troy shot Horton [the victim] as a spontaneous reaction when the victim insulted Petitioner (who was his girlfriend); that no one expected murder would occur during the robbery; and that the reaction in the car when Troy shot the man was disbelief and surprise. (4) The Constitutional error described above has probably resulted in the conviction of one who is innocent of Capital Murder."
>
> *Ground 2*: "Petitioner's 14th Amendment right to due process was violated by the failure to instruct the jury on the lesser included offense of felony-murder under Texas P.C. § 19.02(b)(3)." [Supporting Facts are not recited here – but see Appendix 'I', pp. 121-122.]
>
> *Ground 3*: "Petitioner's ongoing incarceration for capital murder when the trial record establishes that the relevant statute did not prohibit her conduct is cruel and unusual punishment in violation of the 8th Amendment." [Supporting facts are not recited here but see Appendix 'I', p. 122.]

A Memorandum of Points and Authorities was filed on July 11, 2001 in support of the federal petition. (See Appendix 'H'.) The Memorandum preemptively addressed the timeliness of the petition in light of 28 U.S.C. section 2244(d). (*Ibid.*) Petitioner admitted that the petition was late in terms of section 2244(d), but argued that she was entitled to a merits determination because she was innocent of the crime for which she was convicted. Petitioner invoked the miscarriage of justice (MOJ) "gateway" standard, contending it acted to exempt Petitioner's case from

the one-year term of limitations. (See Appendix 'H', pp. 106-108.)

The Magistrate filed a "Memorandum and Recommendation" on December 7, 2001, recommending denial of the petition. (See Appendix 'F'.) The Magistrate agreed that a showing under the MOJ exception would operate to except Petitioner from the limitations period of 28 U.S.C. section 2244(d), but denied Petitioner such recourse for two reasons:

(1) a valid claim of insufficiency of evidence as to an element of a crime only establishes "legal innocence" – not the "actual innocence" required under the miscarriage of justice exception (see Appendix 'F', pp. 54-55);

(2) to properly plead the miscarriage of justice exception one must "offer [ ] newly discovered evidence or [ ] evidence wrongfully excluded at trial" – and Petitioner did neither. (*Ibid.*)

Petitioner filed a timely objection to the Magistrate's Memorandum and Recommendation. (See Appendix 'F'.)

U.S. District Court Judge Janis Graham Jack issued an Order adopting the Magistrate's position on February 7, 2002. (See Appendix 'E'.)

Petitioner filed a timely application for a COA on March 6, 2002. (See Appendix 'D'.)

The U.S. District Court denied the application. (See Appendix 'C'.)

Petitioner filed a motion in support of her application for a COA with the Fifth Circuit on May 15, 2002. (See Appendix 'B'.)

On August 19, 2002, the Fifth Circuit issued an Order refusing Petitioner a COA. (See Appendix 'A'.)

ARGUMENT

Petitioner moved the lower courts to grant a COA on the following issue:

> WHERE A STATE PRISONER IS LEGALLY INNOCENT ON THE FACE OF THE TRIAL RECORD (DUE EITHER TO AN INSUFFICIENCY OF EVIDENCE OR A RECORD THAT POSITIVELY EXONERATES HER OF AN ELEMENT OF THE CRIME), AND WHERE THE STATE FAILS TO PRESENT TO THE DISTRICT COURT ANY EXTRA-RECORD EVIDENCE SUPPORTING HER ACTUAL CULPABILITY, IS THAT PRISONER ENTITLED TO HAVE HER OTHERWISE TIME BARRED CONSTITUTIONAL CLAIMS CONSIDERED ON THE MERITS?

Petitioner argued that this Court answered this question in the affirmative in *Bousley v. United States*, 523 U.S. 614, 619, 623-624, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998). The lower courts have answered the question in the negative, asserting that this Court in *Schlup v. Delo*, 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851 (1995), limited the miscarriage of justice exception to claims of innocence founded upon ***evidence beyond the four corners of the trial record***. (*Id.* at 327-328.)

Petitioner responds that the *dicta* from *Schlup* upon which the lower court relied is being read out of context. *Schlup v. Delo* did not announce a new rule, but rather applied an old rule to a claim of innocence based upon extra-record facts. The rule itself has always been of broader application. In *Murray v. Carrier*, 477 U.S. 478, 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986), the Court stated that a showing that constitutional error "probably resulted in the conviction of one who is actually innocent" would allow a federal habeas court to grant the writ even in the absence of a showing of cause for a procedural default. In *Bousley v. United States*, supra, at 523 U.S. 623-624, this Court – after citing *Murray v. Carrier* and *Schlup v. Delo* – applied the miscarriage of justice exception to an insufficiency of evidence claim, *addressing a single element of a crime, which was wholly based upon the sentencing transcript*. The only caveat was that this Court made clear that the Government, *if it could*, would be allowed to present evidence outside the four corners of the sentencing transcript to rebut the insufficiency as to that element that was apparent on the face of the trial court's records. The holding in *Bousley* makes clear that if the Government failed during this rebuttal that the lower court was to grant Bousley relief. (*Bousley v. United States*, supra, at 523 U.S. 623-624.)

Upon this analysis, the decision of the lower courts to dismiss this petition on procedural grounds is untenable. (See Appendixes A, B, C, E, and F [the Fifth Circuit's denial of a COA, Petitioner's Motion for a COA in the Fifth Circuit, the District Court's denial of Petitioner's Application for a COA, the District Court's Adoption of the Magistrate's Memorandum and Recommendation, and the

Magistrate's Memorandum and Recommendation, respectively].) A COA should issue so that the basic legal issues in the case (i.e., the federal grounds stated in the petition) can be addressed and the underlying miscarriage of justice corrected.

The arguments advanced by the lower courts in denying the petition and the COA are unpersuasive. In *Schlup v. Delo,* supra, at 513 U.S. 315-316, this Court explained that a Petitioner who is probably innocent has won access to a procedural "gateway" which allows an "otherwise barred constitutional claim [to be] considered on the merits."

The Court emphasized that "the line between innocence and guilt" for the purpose of this gateway was the same *legal standard* applied to fix guilt and innocence at trial, that is, the proof beyond a reasonable doubt standard. (*Id.* at 328.)

The question of law posed by this petition is whether a showing of legal innocence on the face of the trial record is sufficient to satisfy the gateway standard. The lower courts held that it was not. (See Appendixes 'A', 'C', 'E', and 'F'.) The lower courts construe the miscarriage of justice exception as requiring a showing of "factual, not legal, innocence." (Exhibit C, p. 31.)

Petitioner's response is simple. The lower courts have misread the holdings of this Court. "Legal innocence" arises where the state has objectively failed to meet its *factual* burden beyond a reasonable doubt. (*Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *Burks v. United States,* 437 U.S. 1, 15-16, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978); *Schlup v. Delo,* supra, at 513 U.S. at 328.)

The case of *Bousley v. United States,* supra, stands for the proposition that a showing of "legal innocence" in terms of the insufficiency or exonerating nature of the evidence adduced at trial can satisfy the "actual innocence" standard so long as the prosecution does not produce any additional extra-record evidence. (*Bousley,* supra, at 623-624). It should also be noted that the Fifth Circuit had already noted the theoretical kinship of the *Jackson* and miscarriage of justice standards. (*Johnson v. Hargett*, 978 F.2d 855, 860, fn. 21 (5th Cir. 1992).) In the same case, that Circuit noted that a showing under the gateway standard is adequate *even if it goes only to a single element of the offense.* (*Ibid.; Sawyer v. Whitley*, 505 U.S. 333, 342, fn. 8, 347, 349-350, 120 L.Ed.2d 269, 112 S.Ct. 2514 (1992) [applying the gateway standard to "those elements which render a defendant eligible for the death penalty"]; *Bousley,* supra, at 523 U.S. 617, 623-624 [applying the gateway standard to a single element of a crime].)

The lower courts have clearly failed to realize that the pertinent distinction between "legal" and "actual" innocence is not that one relies on "facts" while the other on some construct untethered to facts, but that the "actual innocence" or gateway standard allows *either* party to go beyond the four corners of the trial record. Crucially, Petitioner's claims of insufficiency went unrebutted in the District Court. Given the holding in *Bousley*, this failure to rebut converted Petitioner's showing of legal innocence under the *Jackson v. Virginia* standard into one of "actual innocence" under *Bousley, Murray v. Carrier,* and *Schlup v. Delo*. Petitioner was therefore entitled to pass through the procedural gateway to a hearing of her claims *on the merits.*

The lower courts' mistaken idea that a Petitioner must support a claim under color of the actual innocence gateway with newly discovered or wrongly excluded evidence is rooted in an oft paraphrased passage from *Schlup v. Delo*, supra, one that – when read carefully and in context – does not support this construction at all:

> Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, *experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.* [Citation omitted] *To be credible,* such a claim requires Petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. (Emphasis added)

(*Schlup v. Delo,* supra, 513 U.S. at 324.)

This Court's remark that "to be credible" a claim of innocence "requires Petitioner to support his allegations . . . with new reliable evidence" is in juxtaposition to the preceding sentence, which indicates that constitutional error, alone, *rarely* has been shown to cause the conviction of an innocent person. This Court clearly did not mean to establish a rule which would bar such "extremely rare" cases from relief. Indeed, in *Bousley v. United States,* supra, 523 U.S. at 623-624 – as Petitioner has already established – this Court specifically granted access to the actual innocence gateway to a Petitioner who offered nothing more in support of his claim than his sentencing transcript.

A review of the philosophical underpinnings of the 'actual innocence' gateway will more amply demonstrate Petitioner's point.

"The . . . fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." (*Herrera v. Collins,* 506 U.S. 390, 404, 122 L.Ed.2d 203, 113 S.Ct. 853 (1993) [quoting *McClesky v. Zant,* 499 U.S. 467, 502, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991))]. The factors that justify procedural limitations on delayed, abusive, or successive petitions do not logically apply to first-time federal Petitioners who are espousing their innocence under color of the *Jackson v. Virginia* standard. Sufficiency of evidence claims are *sui generis*. They are the only constitutional claims which, when proven, foreclose retrial and require the entry of a judgment of acquittal. (*Burks v. United States*, supra, 437 U.S. at 15-18.) Indeed, the United States Supreme Court has said that in such instances, the Petitioner's case should never "have even been *submitted* to the jury". (emphasis original) (*Id.* at 16.) If one can be more innocent in terms of the *In re Winship* standard – upon which access to the gateway turns (see supra, pp. 9-12) – it certainly is not apparent how.

The jurisprudence of this Court justifies its procedural bars on several grounds. In *Kuhlman v. Wilson,* 477 U.S. 436, 452, 91 L.Ed.2d 364, 106 S.Ct. 2616 (1986), the High Court remarked:

> [A] prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however,

> *to prisoners whose guilt is conceded or plain.* (emphasis added)

(*Kuhlman v. Wilson*, supra, 477 U.S. at 452.) Militating against consideration of delayed, abusive, or successive petitions on their merits are several legitimate State interests:

(1) "Availability of unlimited federal collateral review *to guilty defendants* frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks." (emphasis added) (*Kuhlman v. Wilson,* supra, 477 U.S. at 452-453.)

Obviously, this rationale does not apply to defendants who are plainly innocent of the crime for which they were punished. The State has no legitimate right to gratuitously "make an example" of a person innocent of a given crime so as to deter others from committing that crime.

(2) "Similarly, finality serves the State's goal of rehabilitating those who commit crimes because [r]ehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation'." (*Id.* at 453; see also *McClesky v. Zant,* supra, 499 U.S. at 490-491.)

This rationale does not address conditions extant in the case of a person who was convicted on insufficient evidence. That person *is innocent* in the eyes of the law and is

therefore in no need of rehabilitation as to the crime for which judgment was erroneously entered. In terms of this case, it is irrational to wish to scourge Lora Lee Zaiontz for having an intent consistent with capital murder when, fairly considered, she is "actually innocent" of that intent and that crime.

(3) "Finality also serves the State's legitimate punitive interest. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him. [citation omitted] This result is unacceptable if the State must forgo conviction *of a guilty* defendant through the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time that invariably attends collateral attack." (*Kuhlman v. Wilson,* supra, 477 U.S. at 453; *McClesky v. Zant,* supra, 499 U.S. at 491.)

This factor, also, has no application to a sufficiency of evidence attack, which is brought entirely on the trial record, and which, where successful, precludes even the possibility of retrial. (*Burks v. United States,* supra, 437 U.S. at 16.)

(4) "Unlimited availability of federal collateral attack burdens our criminal justice system *as successive* petitions divert the 'time of judges, prosecutors, and lawyers'. . . . " (emphasis added) (*Kuhlman v. Wilson*, supra, 477 U.S. at 453, fn. 16.)

This factor is irrelevant to *this case* because this is Petitioner's *first* federal petition. It is not successive.

(5) "Finality has special importance in the context of a federal attack on a state conviction. [citations omitted] Reexamination of state conviction on federal habeas 'frustrate[s] . . . both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' [citations omitted] Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." (*McClesky v. Zant*, supra, 499 U.S. at 491; see also *Kuhlman v. Wilson*, supra, 477 U.S. at 453, fn. 16.)

This factor does not bear on *this case* because Texas can have no legitimate interest in enforcing laws on people who have been vindicated at trial. The *Jackson v. Virginia* standard is objective. It protects the State's legitimate interest in its process and its definition of crimes by making every reasonable assumption in favor of the verdict:

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [citation omitted] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts

> to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact-finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The [*Jackson*] criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (Emphasis original) (*Jackson v. Virginia,* supra, 443 U.S. at 319.)

From the above analysis we can see that the "equitable discretion" (*Herrera v. Collins,* supra, 506 U.S. at 404) of this Court must embrace instances where a Petitioner can satisfy the *Jackson v. Virginia* standard, no matter how long their federal petition is delayed. The philosophical considerations which give rise to the gateway standard apply with all the greater force to one who is "actually innocent" on the face of the trial record. By contrast, litigants who bring delayed or successive petitions which rely on constitutional violations supported by extra-record facts pose far more unsettling procedural questions. Petitions supported by facts never considered by the original trier of fact are heir to all the countervailing ills described in the preceding pages. Nevertheless, this Court deems that they should be heard on the merits because "the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty" outranks all other concerns. (*Kuhlman v. Wilson,* supra, 477 U.S. at 453, fn. 16.) A fortiori, where, as here, the societal and individual imperative to free the innocent is not offset by any of the

typical disadvantages, the "equitable discretion" of the federal bench must be invoked.

CONCLUSION

The practical and theoretical justifications for the term of limitations, as with the other federal procedural bars that apply to state habeas petitions, do not support the lower courts' position in this case. (See *Kuhlman v. Wilson,* 477 U.S. 436, 452-453, 91 L.Ed.2d 364, 106 S.Ct. 2616 (1986); *McClesky v. Zant,* 499 U.S. 467, 490-491, 502, 113 L.Ed.2d 517, 111 S.Ct. 1454 (1991).) Petitioner demonstrates her innocence based upon the unembellished trial record. The State is not put to the task of reconstructing its case or dealing with the loss or dispersion of witnesses and evidence. Certainly, 'comity' would not be offended by vacating a conviction that the State had no objective entitlement to in the first instance. (*Burks v. United States,* supra, 437 U.S. at 15-16.) This is a case in which moral imperatives and the law are in perfect harmony. The decision of the lower courts is terribly unjust. A COA should issue.

November 15, 2002

Respectfully submitted,

WILLIAM E. GILG
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40382
USDC No. C-01-CV-172

LORA LEE ZAIONTZ,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Aug. 19, 2002)

ORDER:

Lora Lee Zaiontz, Texas prisoner # 392303, has filed a motion for a certificate of appealability (COA) to appeal the district court's dismissal of her 28 U.S.C. § 2254 petition as barred by the one-year statute of limitations in 28 U.S.C. § 2244(d). To obtain a COA, Zaiontz must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). When the district court has dismissed a 28 U.S.C. § 2254 petition on procedural grounds without reaching the merits of the petitioner's

claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added).

Zaiontz argues that her petition should be considered even though it is untimely because she is actually innocent of the offense of capital murder. She argues that she did not have the requisite intent to commit murder and did not act with intent to promote or assist the murder. Zaiontz has not made a showing of actual innocence. Therefore, it is not necessary to consider whether her claim of innocence should be grounds for tolling of the 28 U.S.C. § 2244(d) statute of limitations. *See Felder v. Johnson*, 204 F.3d 168, 171 & n.8 (5th Cir.), *cert. denied*, 531 U.S. 1035 (2000).

Zaiontz has not shown that reasonable jurists would debate whether the district court erred in dismissing her 28 U.S.C. § 2254 petition as untimely. *See* 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484. Accordingly, her request for COA is DENIED.

/s/ Robert M. Parker
ROBERT M. PARKER
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

LORA LEE ZAIONTZ, Petitioner/ Appellant, vs. JANIE COCKRELL, Director of the Texas Criminal Justice Institutional Division, Respondent/ Appellee.	Case No.: 02-40382 Texas Dist Ct No. C-01-CV-172 MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT THEREOF [FRAP, Rule 22(b)(1)]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS,
NO. C-01-CV-172

THE HONORABLE JANIS GRAHAM JACK,

UNITED STATES DISTRICT JUDGE

PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY UNDER FRAP, RULE 22(b)(1)

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

LORA LEE ZAIONTZ, Petitioner/ Appellant, vs. JANIE COCKRELL, Director of the Texas Criminal Justice Institutional Division, Respondent/ Appellee.	Case No.: 02-40382 Texas Dist. Ct. No. C-01-CV-172 MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY AND BRIEF IN SUPPORT THEREOF [FRAP, Rule 22(b)(1)]

JURISDICTION

The basis for this Court's jurisdiction is Title 28 of the United States Code, sections 1291 and 2253. The District Court had subject matter jurisdiction under Title 28 of the United States Code sections 2241 to 2254.

TIMELIENESS [SIC] OF MOTION

The District Court denied Petitioner's Application for a Certificate of Appealability (COA) by order entered March 13, 2002. (Exhibit A) This is a motion under Federal Rules of Appellate Procedure (FRAP), Rules 22(b)(1) and 27.

STANDARD OF REVIEW OF DISTRICT COURT'S ORDER DENYING THE COA

A circuit judge reviews *de novo* the denial of a COA by a district court. (Liebman & Hertz, *Federal Habeas Corpus*

Practice and Procedure (3rd ed., 1998, Lexis Press) { 35.4c, fn. 86 & related text)

LEGAL STANDARD OF THE GRANT OF A CERTIFICATE OF APPEALABILITY

The applicable legal standard was set forth in *Slack v. McDaniel* (2000) 529 U.S. 473, 484, 146 L.Ed.2d 542, 120 S.Ct. 1595:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

In *Barefoot v. Estelle* (1983) 463 U.S. 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383, the United States Supreme Court expanded on the sort of showing that will qualify under the 'debatable to jurists of reason' standard of review. The Court admonished district courts that they may not deny requests to appeal solely because they have already denied the petition on the merits: "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." (*Id.* 463 U.S. 893, fn. 4.) Rather a certificate must issue if the appeal presents a "question of some substance", that is an issue: (1) that is "debatable among jurists of reason"; (2) "that a court could resolve in a different manner"; (3) that is "adequate to deserve encouragement to proceed further"; or (4) that is not "squarely foreclosed by statute, rule or authoritative court decision", or that is not lacking any factual basis in

the record. (Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2002, Lexis Press) ¦ 35.4c, p. 1587.) The *Barefoot v. Estelle* standard applies to COA's on an issue by issue basis. (*Slack v. McDaniel*, supra, at 529 U.S. 483-484.)

THE MOTION FOR A COA

Petitioner/Appellant moves this Court to grant a COA for the following issue:

> WHERE A STATE PRISONER IS LEGALLY INNOCENT ON THE FACE OF THE TRIAL RECORD (DUE EITHER TO AN INSUFFICIENCY OF EVIDENCE OR A RECORD THAT POSITIVELY EXONERATES HER OF AN ELEMENT OF THE CRIME), AND WHERE THE STATE FAILS TO PRESENT TO THE DISTRICT COURT ANY EXTRA-RECORD EVIDENCE SUPPORTING HER ACTUAL CULPABILITY, IS THAT PRISONER ENTITLED TO HAVE HER OTHERWISE TIME BARRED CONSTITUTIONAL CLAIMS CONSIDERED ON THE MERITS?

Petitioner contends that the United States Supreme Court answered this question in the affirmative in *Bousely* [sic] *v. United States* (1998) 523 U.S. 614, 619, 623-624, 140 L.Ed.2d 828, 118 S.Ct. 1604.) The lower court has answered the question in the negative, asserting that the United States Supreme Court in *Schlup v. Delo* (1995) 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851, limited the miscarriage of justice exception to claims of innocence founded upon *evidence beyond the four corners of the trial record*. (*Id.* at 327-328.)

Petitioner contends that the *dicta* from *Schlup* upon which the District Court relies is being read out of context. *Schlup v. Delo* did not announce a new rule, but rather applied an old rule to a claim of innocence based upon extra-record facts. The rule itself has always been of broader application. In *Murray v. Carrier* (1986) 477 U.S. 478, 496, 91 L.Ed.2d 397, 106 S.Ct. 2639, the Court stated that a showing that constitutional error "probably resulted in the conviction of one who is actually innocent" would allow a federal habeas court to grant the writ even in the absence of a showing of cause for a procedural default. In *Bousley v. United States*, supra, at 523 U.S. 623-624, the Court – after citing *Murray v. Carrier* and *Schlup v. Delo* – applied the miscarriage of justice exception to an insufficiency of evidence claim, *addressing a single element of a crime, which was wholly based upon the sentencing transcript*. The only caveat was that the Court made clear that the Government, *if it could*, would be allowed to present evidence outside the four corners of the sentencing transcript to rebut the insufficiency as to that element that was apparent on the face of the trial court's records. The holding in *Bousley* makes clear that if the Government failed during this rebuttal that the lower court was to grant Bousley relief. (*Bousley v. United States*, supra, at 523 U.S. 623-624.)

Upon this analysis, the decision of the lower court to dismiss this petition on procedural grounds is untenable. (See Exhibits A, B, and C [the Magistrate's Memorandum and Recommendation, the District Judge's Adoption of same, and the District Court's denial of petitioner's Application for a Certificate of Appealability, respectively].) A COA should issue so that the capstone legal issue can be

addressed and the underlying miscarriage of justice corrected.

STATEMENT OF THE CASE

On February 14, 1985, a jury found Petitioner Zaiontz guilty of capital murder in Cause No. 784-CR-1022-A, styled *The State of Texas v. Lora Lee Zaiontz*, in the 28th Judicial Court of Nueces County, Texas. (FP[1] at 2; *Ex parte Zaiontz* Appl. No. 29,570-01[2] at 94-95. The trial court sentenced petitioner to life imprisonment in the Texas Department of Corrections, now the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"). (*Ex parte Zaiontz* Appl. No. 29,570-01 at 95.) Petitioner appealed, and on May 1, 1986, the Thirteenth Court of Appeals affirmed her conviction. (*Zaiontz v. State*, 710 S.W.2d 152 (Tex.App. – Corpus Christi 1986, no, pet.)[3]

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[1] "FP" refers to Zaiontz's federal petition (DE #1) and "FP-Mem." Refers to Zaiontz's memorandum of points and authorities in support of her section 2254 petition (DE #9).

[2] A copy of Zaiontz's state habeas corpus application, *Ex parte Zaiontz* Appl. No. 29,570-01, is filed in the Texas District Court's file at DE #14.

[3] On appeal petitioner raised seven grounds of error. (*Zaointz* [sic] *v. State*, 710 S.W.2d 152, 154-155 (Tex.App. – Corpus Christi 1986, no pet.) In her first two points of error, petitioner argued that the trial court erred in not instructing the jury that a testifying witness was an accomplice as a matter of law. (*Id.* at 154.) The appellate court rejected these grounds and, finding points or [sic] error three, four, and five dependent on grounds one and two, rejected these points of error as well. (*Id.* at 155.) Petitioner's sixth and seventh points of error alleged that the trial court erred in making an affirmative finding in the judgment that a deadly weapon was used. (*Ibid.*) The State agreed that another person, not petitioner, had used the firearm, and the appellate court sustained the seventh ground of error and reformed the judgment

(Continued on following page)

Zaiontz did not file a petition for discretionary review. (FP at 3.)

On August 17, 1995, Zaiontz filed a state application for writ of habeas corpus challenging her capital murder conviction. (*Ex parte Zaiontz* Appl. No. 29,570-01 at 2-20.)[4] On October 18, 1995, the Texas Court of Criminal Appeals denied the application without the written order on the findings of the trial court without a hearing. (*Ex parte Zaiontz* Appl. No. 29,570-01 at cover.

Zaiontz placed her federal petition to the United States District Court of the Southern District of Texas in the prison mail system on April 6, 2001, FP at 7, and it was deemed filed as of that date. (*Spotville v. Cain* (5th Cir. 1998) 149 F.3d 374, 376. The respondent moved to dismiss Zaiontz's petition on the grounds that the petition was barred under the AEDPA's one-year statute of limitations. (DE #10) On December 7, 2001, United States Magistrate Judge Jane Cooper Hill issued her 'Memorandum and Recommendation on Respondent's Motion to Dismiss. (DE #15)[5] In this memorandum Magistrate Judge Hill recommended that Zaiontz's federal petition be

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of the trial court to delete the affirmative deadly weapon finding. (*Ibid.*) Because of this finding, the court did not address petitioner's sixth point of error. (*Ibid.*)

[4] In her state application, petitioner raised the following five grounds for relief: (1) no evidence establishing specific intent to kill the victim; (2) failure to establish each element of the charge beyond a reasonable doubt; (3) ineffective assistance of counsel on appeal; (4) failure to include a lesser included offense instruction in the charge; and (5) ineffective assistance of trial counsel. (*Ex parte Zaiontz*, App. No. 29,570-01 at 7-8.)

[5] See Exhibit A to this Motion.

dismissed as time barred. (DE #15, at 13) On February 7, 2001, United States District Court Judge Janis Graham Jack issued an 'Order Adopting Memorandum and Recommendation on Respondent's Motion To Dismiss'. (DE #19, DE #20.)[6]

On March 6, 2002, petitioner applied to the District Court for a 'Certificate of Appealability'. On March 13, 2002 the District Court denied said 'Certificate of Appealability'. (DE #24)[7] Petitioner now moves this Fifth Circuit Court of Appeals for a 'Certificate of Appealability' pursuant to Federal Rules of Appellate Procedure, Rule 22(b)(1).

STATEMENT OF FACTS

A. Five Kids on Their Way to Corpus Christi.

Russell Stanley received a sentence of 30 years in exchange for his guilty plea to murder. (RT 221.)[8] Russell testified that on August 11, 1984 he was with Troy Kunkle, Tom Sauls, Aaron Adkins, and Petitioner Zaiontz. They were all teenagers and they were all using the drug commonly known as "LSD". (RT 224-225, 298.) The group decided to go to the beach at Corpus Christi to party. (RT 263, 297.) Aaron drove. (RT 236.) Petitioner sat in the front seat, the remaining three sat in the back. (RT 236.)

On the way to Corpus Christi, Aaron and Russell talked about robbing someone. (RT 235-237, 301.) There was a gun in the car. It belonged to Aaron's mother. (RT

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[6] See Exhibit B to this Motion.

[7] See Exhibit C to this Motion.

[8] RT refers to the reporter's transcript of the trial in this matter.

230-231.) At some point during the road trip, Russell fired the gun out the window of the moving car. (RT 232, 266-267, 300.)

According to Russell, once they reached the beach, Troy and petitioner walked by themselves, while Tom, Aaron, and he again discussed robbing someone. (RT 270-272.)

B. The Pay Phone Robbery.

After they left the beach, they drove to a convenience store in Corpus Christi. (RT 269, 275.) There, Aaron and Russell robbed "a man that was standing at the pay phone" in the back of the store. (RT 275-277.) It was Russell's idea. (RT 286.) Russell put the gun against the man's back, demanded the money, while Aaron actually took the money from the victim. (RT 275-277.) Russell then told the man to lay on his stomach. (RT 276.) The duo returned to the car, which was waiting in front of the store. With petitioner at the wheel, they then sped away. (RT 277, 287, 305-307.)

C. The Homicide.

The next significant event that Russell recalled was seeing Steven Horton walking in a field. (RT 237, 278-279.) Russell suggested that they rob him. (RT 238.) The others agreed. (RT 238-239.) Aaron, who was driving again, circled the car back and pulled up next to Horton. (RT 239-240.) Russell had the gun. Petitioner was in the passenger-side front seat. (RT 240.) She hung herself out the window and asked Horton if he wanted a ride. (RT 240, 310.) Horton declined, explaining that he lived just down the street. (RT 240.) Petitioner offered to give him a

ride anyway. (RT 240-241, 290.) Horton got in. (RT 241.) Russell "pulled the gun on [Horton] and told him to give [him] the wallet or [he'd] kill him." (RT 241, 280, 311.) Petitioner told Horton not to look at her and "constantly" kept her hand pressed against the left side of Horton's face so that Horton would not look at her or any of the other people in the car. (RT 344.) (See discussion at II(D), infra.)

Horton's take on his situation was unusual – and tragic. He told Russell to "go ahead and kill [him], that he had been wanting to die for a long time". (RT 242, 311.) Russell again threatened to "shoot him if he did not give [him] the wallet". (RT 243-244, 280.) Troy told Russell to go ahead and shoot him. Russell refused. (RT 244.)

This impasse lasted for about five minutes, during which time Aaron had pulled behind a building and stopped the car. (RT 244-246.) Russell had kept the gun against the back of Horton's head throughout the exchange between him and Horton, (RT 245-246.) Troy then took the gun and shot the man. Troy explained his motive by saying that Horton had "said something smart to [petitioner]", who was his girlfriend. (RT 246.)

Aaron and Russell then started yelling at petitioner "to get the man out of the car". (RT 247, 346.) Petitioner opened the door and pushed Horton out. (RT 247-248.) The car had already started to roll slowly forward. Somebody told her to get Horton's wallet. She did so and gave it to Troy. (RT 248-249, 314-315, 347.) Troy gave the gun back to Russell. (RT 249.) Troy took the money out of the wallet and Russell threw the wallet out the window. (RT 250, 281.) Tom started to cry and whimper about the fact that they would be caught. (RT 251.) Russell threatened Tom with the gun, telling him to shut up. (RT 251, 280.)

Petitioner intervened on Tom's behalf, asking Russell not to shoot him. (RT 251.) Horton's money was spent on beer, which they all consumed. (RT 252, 282.)

D. The Wounds to Steven Horton's Right Eye.

Victor Summers discovered Horton's body in a field. He noted that there was a "swollen area on the right side of [Horton's] face around his eye and below his eye . . . " (RT 99-100.) Horton was lying on his right side. (RT 106.)

Dr. Parks, a pathologist, testified that when he "examined the body, there was an unusual arrangement of marks around his right eye", in the eye socket itself. (RT 129, 142, 144, 352.) Dr. Parks called these "punctate marks", further defining them as the sort of "very circumscribed" wounds that would result from sticking a "sharp object into the flesh". (RT 130.) The wounds in question were "very small". (RT 130.) There were approximately eight of them. (RT 133, 143.) According to the doctor, the wounds were produced while Horton's heart was still functioning, but this finding rested on the presence of what he called a "very early blood clot present on these wounds". (RT 142.)

Dr. Parks admitted to finding the wounds "very puzzling" and declined to theorize as to how the wounds were inflicted. (RT 142.)

Russell Stanley testified that after Horton got into the car, petitioner told him not to "turn around and look at her". (RT 241.) Petitioner was sitting on his left. When he tried to look at her, she pushed his face so that he was again looking straight forward. (RT 242.) Tom testified

that petitioner's hand was "constantly" on Horton's face. (RT 344.) Aaron also pushed the man's face once. (RT 284.)

Tom said that petitioner was sitting to the left of the victim, using her right hand on the victim's *left* cheek. (RT 344.) He said her nails were on the left "side of the guy's face", and that she was not poking them into either of Horton's eyes. (RT 343-344.) Horton asked why "the chick" had her nails "dug in the side of his face". (RT 312, 344.) This may have been the "smart remark" which Troy offered as justification for shooting Horton. (See RT 246.)

Recalled to the stand, Dr. Parks testified that there were no wounds or fingernail marks of any type on the left side of the victim's face. (RT 352.)

E. Dariel Thomas Souls ("Tom").

For the most part, Tom corroborated the story told by Russell Stanley. There were, however, some discrepancies between their stories. First, in Russell's version, Tom expressed agreement with, and participated in, the robbery plans. (RT 239, 271, 280, 313-314.) In Tom's version, he had consistently objected to the robberies as they were being planned. (RT 300-301, 305-306, 308-309, 337, 339-340.) Second, in Tom's version, Troy snatched the gun out of Russell's hands before Aaron drove the car behind the abandoned building where Horton was shot. (RT 312-313.) Third, Tom did not recall any discussion between him, Aaron, and Russell on the beach in Corpus Christi about robbing someone. (RT 334-335, 338.) Nor did he recall an attempt to break into a car parked near the beach. (RT 334-335, 338.) Russell's testimony contradicted Tom's on these points. (RT 270-271.) Fourth, in Tom's version, Russell did not threaten to kill Horton. (RT 342.) Tom just

recalled Russell demanding the wallet after he announced that this was no joke or "little kid's game". (RT 342.) Fifth, Tom recalled that Troy, after snatching the gun from Russell, told the man, "If you don't give me your wallet right now, I am going to blow your head off". (RT 343.)

Probably the most important testimony Tom offered concerned the reaction of the group, to the shooting. He testified that Aaron immediately remarked: "What did you shoot that guy in my car for?" (RT 345.) Russell "just looked astonished". (RT 345.) Tom was also "astonished by everything that happened". (RT 346.) Tom "didn't think [Horton] was going to be shot". Indeed, Tom opined that "*no one thought [Horton] was going to be shot*". (RT 346.)

Tom was never charged or arrested in connection with the homicide. (RT 320-321.)

F. The State's Closing Argument.

Both of the prosecutor's assigned to the case had an opportunity to give a closing argument. The most telling aspect of their arguments is that they *never once* asserted that they had proven the intent requisite to Capital Murder under Texas law. To be more specific, they *never once* asserted that they had proven petitioner knew of the intent of Troy to kill the victim and that petitioner acted with intent to promote or assist the homicide by encouraging, directing, aiding or attempting to aid, Troy in the shooting (See RT 390-394, 423-437 [their full summations].) Yet, this was the essential part of their burden on the charge for which petitioner stands convicted. (See

Texas Penal Code {{ 7.02(a)(2), 19.03(a)(2); CT 56-57[9] [the relevant jury instructions; see also *Fincher v. State* (1998) 980 S.W.2d 886, 888; *Duke v. State* (1997) 950 S.W.2d 424, 427; *Lawton v. State* (1996) 913 S.W.2d 542, 555 [all three Texas cases holding that before a defendant may be convicted of capital murder based upon the conduct of another, it must be proven beyond a reasonable doubt that said defendant harbored the specific intent to promote or assist in the commission of that intentional murder].)

With respect to their version of the facts, the prosecutors focused on "five acts" committed by Petitioner:

(1) Petitioner lured Horton into the car (RT 424);

(2) Petitioner kept "slapping" Horton's face so that "she could not be identified" (RT 424);

(3) Petitioner opened the door and pushed Horton out of the car (RT 424-425);

(4) Petitioner asked Aaron to slow the car down and took Horton's wallet (RT 425); and

(5) She retrieved the wallet. (RT 425.)

These "five acts", according to the prosecutors, proved she was "a willing participant" in the "robbery". (RT 427.) "Look at the young woman's state of mind when she is the getaway driver, when she knows a robbery is going to occur. . . . (RT 432.)

Neither of the prosecutors ever argued that petitioner was an intentional or knowing aider and abettor of

[9] CT refers to the clerk's transcript of the proceedings in this matter.

murder. It was never asserted that she knew Troy would actually shoot Horton or that any of her actions were done with the expectation of assisting Troy in killing Horton. (RT 390-394, 423-437.) In this way the summation of the State's representatives mirrored the evidentiary gaps in their case in chief.

SUMMARY OF PETITIONER'S CLAIMS

GROUND #1: Petitioner's Fourteenth Amendment right to due process was violated by her conviction on evidence insufficient to establish that she had the state of mind requisite for capital murder under Texas law. In order to prove capital murder under Texas Penal Code sections 7.02(a)(2) and 19.03(a)(2), the State had to prove beyond a reasonable doubt that Petitioner both knew of the intent of Troy Kunkle to kill the victim and that she acted with intent to promote or assist the commission of the offense by encouraging, directing, aiding, or attempting to aid Troy in the shooting. The jury was so instructed.

The facts, as alleged in the underlying federal petition, exonerating petitioner of the specific intent of capital murder are as follows. The evidence the State presented regarding petitioner's intent and state of mind was, at best, to the effect that she was a knowing and willing participant in robbery; that she expected the victim to survive the robbery and took action to prevent him from being able to later recognize her; that she had her hand in the line of fire when the victim was shot; that all the relevant discussions of the day were about robbing people; that none of said discussions involved shooting or killing anyone; that two of her male accomplices had robbed a man without shooting him earlier that day; that the

person who was armed at the time petitioner invited the victim into the car refused to shoot him – even though the victim himself invited him to do so; that no one expected Troy to grab the gun; that Troy shot Horton as a spontaneous reaction when the victim insulted petitioner (who was his girlfriend); that no one expected murder would occur during the robbery; and that the reaction in the car when Troy shot the man was disbelief and surprise.

GROUND #2: Ground #2 of the petition alleges a classic violation of the doctrine of *Beck v. Alabama* (1980) 447 U.S. 625, 627, 65 L.Ed.2d 392, 100 S.Ct. 2382. The jury was not instructed as to any lesser-included offense of the capital murder charge upon which Petitioner was convicted – despite the fact that felony-murder is a lesser included offense of capital murder under Texas law. Ground #2 asserts that this error violated petitioner's Fourteenth Amendment right to due process, especially in light of the insufficiency of the evidence for capital murder.

GROUND #3: Ground #3 of the petition asserts that "Petitioner's ongoing incarceration for capital murder when the trial record establishes that the relevant statute did not prohibit her conduct is cruel and unusual punishment in violation of the Eighth Amendment."

For the purposes of this motion for a COA, this Court need only satisfy itself that these federal constitutional grounds are plausible. (*Petrocelli v. Angelone* (9th Cir. 2001) 248 F.3d 877, 885.)

THE FINDINGS OF THE DISTRICT COURT

The Texas District Court found that petitioner raised Grounds 1 and 2 in her state habeas corpus applications,

Ex parte Zaiontz Appl. No. 29,570-01 at 7-8, and as such, petitioner had exhausted her state remedies as required by 28 U.S.C. (2254(b) and (c) as to Grounds 1 and 2. (*Thomas v. Collins* (5th Cir. 1990) 919 F.2d 333, 334, cert den., 501 U.S. 1235, 111 S.Ct. 2862 (1991).

Said District Court found that petitioner did not raise Ground 3 on appeal or in her state habeas application. The District Court held that a federal habeas court may find unexhausted claims to be procedurally barred. (*Coleman v. Thompson* (1991) 501 U.S. 722, 735, 115 L.Ed.2d 640, 111 S.Ct. 2546.) The normal rule, that a state court must explicitly apply a procedural bar to preclude federal review, does not apply to cases where a petitioner fails to exhaust state court remedies and the state court to which she would be required to present her unexhausted claims would now find those claims to be procedurally barred. ((*Id.* at 501 U.S. 735, fn. 1.) In such cases, the federal procedural default doctrine precludes federal habeas review. (*Ibid.*; see also *Gray v. Netherland* (1996) 518 U.S. 152, 161, 116 S.Ct. 2074; *Teague v. Lane* (1989) 489 U.S. 288, 298-299, 109 S.Ct. 1060 [finding an unexhausted claim to be procedurally barred]; *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, 1280, fn. 48 [finding several unexhausted claims would be barred by the Texas contemporaneous objection rule, thus federal habeas corpus review was procedurally barred], cert. den., 116 S.Ct. 2559 (1996).)

The lower District Court also made a procedural default finding as to Ground #3. However, this issue is obviously moot. If petitioner was allowed to avail herself of the miscarriage of justice exception, that exception would nullify the effect of any procedural default. (*Murray v. Carrier*, supra, at 477 U.S. 495-496; *McClesky v. Zant*

(1991) 499 U.S. 467, 494-495, 113 L.Ed. 517, 111 S.Ct. 1454.) Moreover, the lower court was mistaken. Ground #3 is only valid if Petitioner was convicted on insufficient or exonerating, evidence as alleged in Ground #1. No one disputes that Ground #1 was fully and fairly presented at the highest level of the Texas appellate system. The federal exhaustion doctrine does not require Petitioner to pursue ineffective State remedies. (28 U.S.C. { 2254(b)(1)(B)(i), (ii).) The denial of Ground #1 was, necessarily, a finding by Texas that there was nothing cruel and unusual about keeping petitioner in prison. "Further proceedings would be futile." (*Nix v. Whiteside* (1986) 475 U.S. 157, 163, fn. 3, 89 L.Ed.2d 123, 106 S.Ct. 988.) The claim was not defaulted.

ARGUMENT

In *Schlup v. Delo*, supra, at 513 U.S. 315-316, the Court explained that a petitioner who is probably innocent has won access to a procedural "gateway" which allows an "otherwise barred constitutional claim [to be] considered on the merits."

The Court emphasized that "the line between innocence and guilt" for the purpose of this gateway was the same *legal standard* applied to fix guilt and innocence at trial, that is, the proof beyond a reasonable doubt standard. (*Id.* at 328.)

The question of law posed by this appeal is whether a showing of legal innocence on the face of the trial record is sufficient to satisfy the gateway standard. The lower court held that it was not. (Exhibits A to C.) The lower court construes the miscarriage of justice exception as requiring

a showing of "factual, not legal, innocence." (Exhibit C, p. 3.)

Petitioner's response is simple. The District Court has misread the holdings of the Supreme Court. "Legal innocence" arises where the state has objectively failed to meet its *factual* burden beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781; *Burks v. United States* (1978) 437 U.S. 1, 15-16, 57 L.Ed.2d 1, 98 S.Ct. 2141; *Schlup v. Delo*, supra, at 513 U.S. at 328.)

The case of *Bousley v. United States*, supra, stands for the proposition that a showing of "legal innocence" in terms of the insufficiency or exonerating nature of the evidence adduced at trial can satisfy the "actual innocence" standard so long as the prosecution does not produce any additional extra-record evidence. (*Bousley*, supra, at 623-624.) It should also be noted that this Circuit has already noted the theoretical kinship of the *Jackson* and miscarriage of justice standards. (*Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 860, fn. 21.) In the same case, this Circuit noted that a showing under the gateway standard is adequate *even if it goes only to a single element of the offense*. (*Ibid.*; *Sawyer v. Whitley* (1992) 505 U.S. 333, 342, fn. 8, 347, 349-350, 120 L.Ed.2d 269, 112 S.Ct. 2514 [applying the gateway standard to "those elements which render a defendant eligible for the death penalty]; *Bousley*, supra, at 523 U.S. 617, 623-624 [applying the gateway standard to a single element of a crime].)

The lower District Court has clearly failed to realize that the pertinent distinction between 'legal' and 'actual' innocence is not that one relies on "facts" while the other on some construct untethered to facts, but that the "actual

innocence" or gateway standard allows *either* party to go beyond the four corners of the trial record. Crucially, petitioner's claims of insufficiency went unrebutted in the trial court. Given the holding in *Bousley*, this failure to rebut converted petitioner's showing of legal innocence under the *Jackson v. Virginia* standard into one of "actual innocence" under *Bousley*, *Murray v. Carrier* and *Schlup v. Delo*. Petitioner was therefore entitled to pass through the procedural gateway to a hearing of her claims *on the merits*.

CONCLUSION

The practical and theoretical justifications for the term of limitations, as with the other federal procedural bars that apply to state habeas petitions, do not support Texas District Court's position in this case. (See *Kuhlman v. Wilson* (1986) 477 U.S. 436, 452-453, 91 L.Ed.2d 364, 106 S.Ct. 2616; *McClesky v. Zant* (1991) 499 U.S. 467, 490-491, 502, 113 L.Ed.2d 517, 111 S.Ct. 1454.) Petitioner demonstrates her innocence based upon the unembellished trial record. The State is not put to the task of reconstructing its case or dealing with the loss or dispersion of witnesses and evidence. Certainly, 'comity' would not be offended by vacating a conviction that the State had no objective entitlement to in the first instance. (*Burks v. United States*, supra, 437 U.S. at 15-16.) This is a case in which moral imperatives and the law are in perfect harmony. The decision of the lower District Court is terribly unjust. A Certificate of Appealability should issue.

LOCAL RULE 27.1 STATEMENT

On May 13, 2002 at approximately 3:25 PM (Texas time) I attempted to contact respondent's attorney, Karyl Krug at (512) 936-1400 to ascertain whether or not respondent would be filing an oppostion [sic] to this motion. Ms. Krug was not in but she identified herself on her voice mail. I then left a message that I was requesting whether or not she intended to oppose this motion as required by Local Rule 27.1 and asked that she return my phone call. As of May 14, 2002 1 have not heard from her.

May 14, 2002

Respectfully Submitted,

/s/ William E. Gilg
WILLIAM E. GILG,
Attorney In Charge for Petitioner
California State Bar No. 151991
Southern District of Texas Bar No.
(Admitted Pro Hoc Vice by April 24, 2001 Court Order)
305 San Bruno Avenue West
San Bruno, CA 94066
(650) 871-8647
(650) 873-3168 (fax)

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the City of San Bruno, that I am over the age of eighteen (18) years and not a party to the within cause; that my business address is 620 Jefferson Avenue, Redwood City, California; and that on the date set out below I deposited a true copy of the attached

documents, listed below, on the parties to the action by one or more of the following methods:

[XX] First Class Mail

[ ] Fax via ( )

– by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Redwood City, California;

Documents Served: PETITIONER'S MOTION FOR CERTIFICATE OF APPEALABILITY WITH BRIEF IN SUPPORT THEREOF; EXHIBITS IN SUPPORT THEREOF

Party Served: KARYL KRUG, ESQ.
Assistant Attorney General
Deputy Chief, Habeas Corpus Division
P.O. Box 12548, Capital Station
Austin, Texas 78711

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed at San Bruno, California on May 14, 2002.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LORA LEE ZAIONTZ	§	
V.	§	C.A. NO. C-01-172
	§	
JANIE COCKRELL	§	

ORDER DENYING CERTIFICATE OF APPEALABILITY

By Order (DE #19) and Final Judgment (DE #20) entered February 7, 2002, the Court adopted the memorandum and recommendation of the magistrate judge (DE #15) and denied petitioner's § 2254 petition for habeas corpus relief. On March 6 2002, petitioner filed a notice of appeal (DE #22) and a motion for a certification of appealability ("COA") (DE #23). For the reasons stated herein, the Court denies petitioner's motion for a COA.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), went into effect on April 24, 1996. The AEDPA provides that an appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A).

To obtain a COA, Zaiontz must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. 2253(c)(2); *Robertson v. Johnson*, 234 F.3d 890, 897 (5th Cir. 2000); *Barrientes v. Johnson*, 221 F.3d 741, 771 (5th Cir. 2000). To meet this standard, Zaiontz must demonstrate "'that reasonable jurists could debate

whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Barrientes*, 221 F.3d at 771 (quoting *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 1603-04 (2000)).

In her § 2254 motion, petitioner challenged her 1985 capital murder conviction and life sentence as violative of due process, arguing that there was insufficient evidence to establish that she had the requisite state of mind for capital murder (claim 1) and that the jury should have been instructed on the lesser included offense of felony murder (claim 2). She also claimed that, because she is innocent of the crime for which she was convicted, her present incarceration violates her Eighth Amendment right to be free from cruel and unusual punishment (claim 3).

Respondent moved to dismiss Zaiontz' petition as time barred. The record established that Zaiontz' conviction became final prior to AEDPA's enactment. Accordingly, she had one year from AEDPA's enactment date to file her petition. Her petition, filed on April 6, 2001, was time barred, and there were no grounds for equitable tolling. Claims 1 and 2 were dismissed as time barred. Petitioner's claim 3 had never been raised in a state habeas application and was barred from federal habeas review under the procedural default doctrine.[1] Zaiontz argued that she was entitled to a merits determination of her habeas corpus claims on the grounds that she is actually innocent of the

[1] Claim 3 was also time barred.

crime for which she was convicted, and that the miscarriage of justice exception would allow consideration of her claims otherwise barred by AEDPA's limitations. However, because her miscarriage of justice claim was premised on her claim of *legal*, not *actual* innocence, the miscarriage of justice exception does not apply to her claim.

In her request for a COA, Zaiontz reargues her claim of actual innocence, and argues that her claim of legal innocence is sufficient where the government fails to respond with additional evidence in the post-conviction context. She concludes that reasonable jurists would disagree as to whether the miscarriage of justice exception applies to her case to permit consideration of her time barred petition.

Petitioner's arguments are not well founded. Petitioner, not the government, clearly has the burden of showing factual, not legal, innocence. Without such a showing, her underlying constitutional claims cannot be considered. She made no such showing. For the reasons stated in the memorandum and recommendation and this Court's order adopting same, and after consideration of the record in the case, the Court finds that petitioner has not made a substantial showing that she has been denied a constitutional right. Nor would jurists of reason find it debatable whether petitioner's claims were properly barred from a review on the merits. Consequently, the Court finds that petitioner is not entitled to a COA. Nonetheless, the Court advises petitioner that she may request the issuance of a COA from a circuit court of appeals judge. If the district judge has denied the COA, the applicant may then request issuance of the certificate by a circuit judge. Fed. R. App. P. 22(b). If petitioner does

not expressly make such a request for a COA, the notice of appeals shall be deemed to constitute a request addressed to the judges of the court of appeals. *Id.*

For the above reasons, the Court hereby DENIES petitioner's motion for certificate of appealability.

ENTERED on this the 12th day of March, 2002.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT
JUDGE

APPENDIX D

WILLIAM E. GILG
Attorney at Law, #151991
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(650) 873-3168 (fax)

Attorney for Petitioner,
LORA LEE ZAIONTZ

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

LORA LEE ZAIONTZ, Petitioner, vs. JANIE COCKRELL, Director of the Texas Criminal Justice Institutional Division, Respondent.	Case No.: 01-CV00172 PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY [28 U.S.C. { 2253]

TO THE HONORABLE JANIS GRAHAM JACK, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS AND TO THE HONORABLE JANE COOPER-HILL, U.S. MAGISTRATE JUDGE:

Petitioner Lora Lee Zaiontz hereby applies for a Certificate of Appealability (COA) under Title 28 of the United States Code, section 2253 from the District Court's Order in this action entered on February 5, 2002, dismissing this petition with prejudice.

I

THE LEGAL STANDARD FOR THE GRANT OF A CERTIFICATE OF APPEALABILITY

The applicable legal standard was set forth in *Slack v. McDaniel* (2000) 529 U.S. 473, 484, 146 L.Ed.2d 542, 120 S.Ct. 1595:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

In *Barefoot v. Estelle* (1983) 463 U.S. 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383, the United States Supreme Court expanded on the sort of showing that will qualify under the 'debatable to jurists of reason' standard of review. The Court admonished district courts that they may not deny requests to appeal solely because they have already denied the petition on the merits: "[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." (*Id.* 463 U.S. 893, fn. 4.) Rather a certificate must issue if the appeal presents a "question of some substance", that is an issue: (1) that is "debatable among jurists of reason"; (2) "that a court could resolve in a different manner"; (3) that is "adequate to deserve encouragement to proceed further"; or (4) that is not "squarely foreclosed by statute, rule or authoritative court decision", or that is not lacking any factual basis in the record. (Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2002, Lexis Press) { 35.4c,

p. 1587.) The *Barefoot v. Estelle* standard applies to COA's on an issue by issue basis. (*Slack v. McDaniel*, supra, at 529 U.S. 483-484.)

II

THE RELEVANT FINDINGS OF THE COURT

This Court did not reach the merits of Petitioner's claims. Respondent did not address the issue of whether the conviction was supported by sufficient evidence, nor did she address either of the other two claims. Since it must be conceded that the petition and its supporting memorandum describe federal constitutional grounds with colorable support in the record, the procedural issues upon which the petition was denied are the only aspect of the case that need be addressed here. (*Petrocelli v. Angelone* (9th Cir. 2001) 248 F.3d 877, 885 [if a "quick look" at the face of the petition suggests that claims denied on procedural grounds state the denial of a federal constitutional right, the analysis should then shift to the procedural basis for the district court's decision].)

This Court agreed that a showing of "actual innocence" within the meaning of the miscarriage of justice exception of *Schlup v. Delo* (1995) 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851 and *Murray v. Carrier* (1986) 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639, would exempt Petitioner from the one-year term of limitations. (DE #15, pp. 10-11.) However, the Court denied relief because it believed that:

(1) a valid claim of insufficiency of evidence as to an element of a crime only establishes "legal innocence" – not the "actual innocence" required

under the miscarriage of justice exception (DE #15, pp. 9, 12); and

(2) to properly plead the miscarriage of justice exception one must "offer [ ] newly discovered evidence or [ ] evidence wrongfully excluded at trial" – and Petitioner (admittedly) did neither (DE #15, pp. 9, 12).

The procedural default findings of the Court were obviously moot, if Petitioner was allowed to avail herself of the miscarriage of justice exception, that exception would also nullify the effect of any procedural default. (See Petitioner's Objection to Memorandum and Recommendation of 12/7/01, pp. 24-28.)

III

PETITIONER'S ARGUMENT IN FAVOR OF A CERTIFICATE OF APPEALABILITY

It can safely be assumed that the Court already recognizes that Petitioner's argument in this case presents "a question of some substance", and one that is not "squarely foreclosed by" precedent. This Court has relied on *Schlup v. Delo*, supra, for the notion that a presentation under the miscarriage of justice exception must be supported by extra-record evidence. (DE #15, p. 9.) However, this *dicta* from *Schlup* is not easily reconciled with *Bousley v. United States* (1998) 523 U.S. 614, 619, 623-624, 140 L.Ed.2d 828, 118 S.Ct. 1604. In *Bousley* the United States Supreme Court applied the miscarriage of justice exception to an insufficiency of evidence claim, *addressing a single element of a crime, which was wholly based upon the sentencing transcript.*

While on remand the Government was allowed to present evidence outside the four corners of the sentencing transcript to demonstrate that sufficient evidence existed to establish the 'active employment' of a firearm element of Title 18 of the United States Code, section 924(c)(1), it is clear from the holding in *Bousley* that any failure during this rebuttal would require the lower court to grant Bousely relief. (*Bousley*, supra, 523 U.S. at 623-624.)

CONCLUSION

As Petitioner noted in her objection, it can be plausibly argued that the prudential underpinnings of the miscarriage of justice exception apply with even greater force to a claim of innocence based upon the unaugmented record at trial. (See Petitioner's Objection to Memorandum and Recommendation entered on 12/7/01, pp. 15(4) – 24(15).) The Fifth Circuit has noted the theoretical kinship of the *Jackson v. Virginia* standard (for claims of insufficiency of the evidence) and the miscarriage (or 'gateway') standard applied in *Schlup v. Delo*. (*Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 860, fn. 21, cert den 507 U.S. 1007. The Fifth Circuit, in the same case, also noted that a showing under the gateway standard is adequate even if it goes only to a single element of the offense. (*Ibid.*)

The United States Supreme Court made clear in *Schlup v. Delo*, supra, that, if anything, the *Jackson* standard is more strict than the gateway standard. (*Schlup v. Delo*, supra, 513 U.S. at 323, fn. 38. 329-330.) *Bousley v. United States*, supra, suggests that *Schlup's* emphasis on extra-record evidence probably was a function of the facts of that case, which of course turned on an extra-record showing of innocence.

Finally, while as the *Bousley* and *Schlup* Courts noted, "actual innocence" does not mean "mere legal insufficiency", where the Government does not respond in the post-conviction setting with additional evidence, both decisions support the idea that legal insufficiency will prevail under the gateway standard. (*Bousley*, supra, 523 U.S. at 619, 623-624; *Schlup*, supra, 513 U.S. 327-328; see also *Burks v. United States* (1978) 437 U.S. 1, 15-16, 57 L.Ed.2d 1, 98 S.Ct. 2141.)

Given the above authority, and the lack of any federal authority directly addressing the arguments that Petitioners has raised, a COA should issue. The merits of Petitioner's underlying claims have never been addressed. The Court, for the purpose of the within request, must assume them to be valid. Certainly, it must be conceded that profound moral and legal issues have been raised in the briefing before this Court. It is not intuitively obvious that this Government has any defensible interest in retaining in prison a woman who was entitled to a judgment of acquittal on the charge of capital murder in the first instance. It is difficult to see how the legitimate interests of this great country are served by interposing a statute of limitations between a person the law defines to be "innocent" and the acquittal that such person is plainly entitled to. (*Burks v. United States*, supra, at 437 U.S. 15-16.)

Petitioner prays for the issuance of a COA so that the Fifth Circuit and, if need be, the United States Supreme Court, may have an opportunity to consider the issues of first impression which exist in this case.

March 4, 2002 Respectfully Submitted,

/s/ William E. Gilg
WILLIAM E. GILG,
Attorney In Charge for Petitioner
California State Bar No. 151991
Southern District of Texas
Bar No. (Admitted Pro Hoc
Vice by April 24, 2001
Court Order)
305 San Bruno Avenue West
San Bruno, CA 94066
(650) 871-8647
(650) 873-3168 (fax)

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the City of San Bruno, that I am over the age of eighteen (18) years and not a party to the within cause; that I am an active member of the State Bar of California; that my business address is 305 San Bruno Avenue West, San Bruno, California; and that on the date set out below I deposited a true copy of the attached documents, listed below, on the parties to the action by one or more of the following methods:

[XX] First Class Mail

[ ] Fax via ( )

– by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully pre-paid in the United States Mail at San Bruno, California;

Documents Served: PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

Party Served: KARYL KRUG, ESQ.
Assistant Attorney General
Deputy Chief, Habeas Corpus Division
P.O. Box 12548, Capital Station
Austin, Texas 78711

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Bruno, California on March 4, 2002.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LORA LEE ZAIONTZ	§	
V.	§	C.A. NO. C-01-172
	§	
JANIE COCKRELL	§	

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION ON RESPONDENT'S MOTION TO DISMISS

On December 4, 2001, United States Magistrate Judge Jane Cooper-Hill signed a Memorandum and Recommendation recommending that Respondent's motion to dismiss be granted and Petitioner Lora Lee Zaiontz' claims that there is insufficient evidence to establish that she had the state of mind requisite for capital murder under Texas law, and that her due process rights were violated by the failure of the trial court to instruct the jury on the lesser included offense of felony murder, be dismissed as untimely. 28 U.S.C. § 2244(d). The Memorandum and Recommendation further recommended that Petitioner's claim that because she is innocent of the crime for which she was convicted, her present incarceration violates her Eighth Amendment right to be free from cruel and unusual punishment, be dismissed as procedurally barred from federal review, or, in the alternative, as time barred. On January 15, 2002, Petitioner filed objections to the Magistrate's Recommendations.

Having reviewed the findings of fact and conclusions of law therein, as well as the pleadings on file and

Petitioner's objections, and having made a *de novo* disposition of those portions of the Magistrate Judge's recommended disposition to which objections were raised, *see Koetting v. Thompson*, 995 F.2d 37 (5th Cir. 1993), 28 U.S.C. § 636(b)(1)(C); Fed.R.Civ.P.72(b), this Court hereby adopts as its own the findings and conclusions of the Magistrate Judge.

Accordingly, it is ORDERED that Respondent's motion to dismiss is granted. Petitioner Lora Lee Zaiontz' claims that there is insufficient evidence to establish that she had the state of mind requisite for capital murder under Texas law, and that her due process rights were violated by the failure of the trial court to instruct the jury on the lesser included offense of felony murder, are dismissed as untimely. 28 U.S.C. § 2244(d). Petitioner's claim that because she is innocent of the crime for which she was convicted, her present incarceration violates her Eighth Amendment right to be free from cruel and unusual punishment, is dismissed as procedurally barred from federal review, or, in the alternative, as time barred.

The clerk shall enter this order and provide a copy to all parties.

SIGNED this 5th day of February, 2002.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LORA LEE ZAIONTZ	§	
V.	§	C.A. NO. C-01-172
	§	
JANIE COCKRELL	§	

FINAL JUDGMENT

In accordance with the Court's Order Adopting Memorandum and Recommendation on Respondent's Motion to Dismiss, the Court hereby enters Final Judgment dismissing Lora Lee Zaiontz' petition.

ORDERED this 5th day of February, 2002.

/s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT
JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

LORA LEE ZAIONTZ	§	
	§	
VS.	§	C.A. NO. C-01-172
	§	
JANIE COCKRELL	§	

MEMORANDUM AND RECOMMENDATION ON RESPONDENT'S MOTION TO DISMISS

In this § 2254 habeas corpus action, petitioner Lora Lee Zaiontz ("Zaiontz") challenges her 1985 capital murder conviction and life sentence as violative of due process, arguing that there was insufficient evidence to establish that she had the requisite state of mind for capital murder and that the jury should have been instructed on the lesser included offense of felony murder (DE #1). She also claims that, because she is innocent of the crime for which she was convicted, her present incarceration violates her Eighth Amendment right to be free from cruel and unusual punishment. Respondent moves to dismiss on the grounds that Zaiontz' petition is barred under AEDPA's one year statute of limitations (DE 310), Zaiontz opposes the dismissal and argues that, because she is actually innocent of the crime for which she is incarcerated, the miscarriage of justice exception applies such that the Court can considered [sic] her claims despite the time limitations of § 2244 (DE #9, #12). She also claims that, because her English Amendment injury is ongoing, that claim is timely raised.

For the reasons stated herein, it is recommended that respondent's motion for summary judgment be granted and that Zaiontz' first two claims be dismissed as time barred. It is recommended that her Eighth Amendment claim be dismissed as procedurally barred from federal habeas corpus review, or, in the alternative, as time barred.

I. JURISDICTION

The Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 2241, 2254.

II. BACKGROUND

On February 14, 1985, a jury found Zaiontz guilty of capital murder in Cause No. 784-CR-1022-A, styled *The State of Texas v. Lora Lee Zaiontz*, in the 28th Judicial District Court of Nueces County, Texas. FP[1] at 2; *Ex parte Zaiontz* Appl. No. 29,570-01[2] at 94-95.[3] The trial court

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[1] "FP" refers to Zaiontz' federal petition (DE #1) and "FP-Mem." refers to Zaiontz' memorandum of points and authorities in support of her § 2254 petition (DE #9).

[2] a copy of Zaiontz' state habeas corpus application, *Ex parte Zaionta* Appl. No. 29,570-01, is filed in this case at DE #14.

[3] Briefly, the facts were these: On August 11, 1984, Zaiontz, along with four male friends, was traveling from San Antonio to Corpus Christi. FP-Mem. at 2-3. They were all using the drug LSD. FP-Mem. at 3. At one point in the evening, two of the males robbed a man at gunpoint at a pay phone. FP-Mem. at 3. After leaving the pay phone, the group picked up Steven Horton who was walking in a field. FP-Mem. at 4. One of the males put a gun to Horton's head and demanded his money. FP-Mem. at 4. Zaiontz told Horton not to look at her and constantly kept her hand pressed against the left side of his face so that

(Continued on following page)

sentenced petitioner to life imprisonment in the Texas Department of Corrections, now the Texas Department of Criminal Justice, Institutional Division ("TDCJ-ID"). *Ex parte Zaiontz* Appl. No. 29,570-01 at 95. Zaiontz appealed, and on May 1, 1986, the Thirteenth Court of Appeals affirmed her conviction. *Zaiontz v. State,* 710 S.W.2d 152 (Tex. App. – Corpus Christi 1986, no. pet.).[4] Zaiontz did not file a petition for discretionary review. FP at 3.

On August 17, 1995, Zaiontz filed a state application for writ of habeas corpus challenging her capital murder conviction. *Ex parte Zaiontz* Appl. No. 29,570-01 at 2-20.[5]

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he would not look at her or the others in the car. FP-Mem. at 4. Another male took the gun away and shot Horton in the back of the head. FP-Mem. at 4. Zaiontz pushed Horton from the car and retrieved his wallet. FP-Mem. at 5. They spent Horton's money on beer, which they all consumed. FP-Mem. at 6.

[4] On appeal, Zaiontz raised seven (7) grounds of error. *Zaiontz v. State*, 710 S.W.2d 152, 154-155 (Tex. App. – Corpus Christi 1986, no. pet.). In her first two points of error, Zaiontz argued that the trial court erred in not instructing the jury that a testifying witness was an accomplice as a matter of law. *Id.* at 154. The appellate court rejected these grounds and, finding points of error three, four and five dependent on grounds one and two, rejected those points of error as well. *Id.* at 155. Zaiontz' sixth and seventh points of error alleged that the trial court erred in making an affirmative finding in the judgment that a deadly weapon was used. *Id.* The State agreed that another person, not Zaiontz, had used the firearm, and the appellate court sustained the seventh ground of error and reformed the judgment of the trial court to delete the affirmative deadly weapon finding. *Id.* Because of this finding, the court did not address Zaiontz' sixth point of error. *Id.*

[5] In her state application, Zaiontz raised the following five grounds for relief: (1) no evidence establishing specific intent to kill the victim; (2) failure to establish each element of the charge beyond a reasonable doubt; (3) ineffective assistance of counsel on appeal; (4) failure to include a lesser included offense instruction in the charge; and (5)

(Continued on following page)

On October 18, 1995, the Texas Court of Criminal Appeals denied the application without written order on the findings of the trial court without a hearing. *Ex parte Zaiontz* Appl. No. 29,570-01 at cover.

Zaiontz placed the instant federal petition in the prison mail system on April 6, 2001, FP at 7, and it is deemed filed as of that date. *Spotville v. Cain*, 149 F.3d 374, 376 (5th Cir. 1998).

III. PETITIONER'S ALLEGATIONS

Zaiontz challenges her conviction and confinement on the following grounds:

1. There is insufficient evidence to establish that she had the state of mind requisite for capital murder under Texas law;

2. Her due process rights were violated by the failure of the trial court to instruct the jury on the lesser included offense of felony murder; and

3. Because she is innocent of the crime for which she was convicted, her present incarceration violates her Eighth Amendment

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ineffective assistance of trial counsel. *Ex parte Zaiontz*, Appl. No. 29,570-01 at 7-8.

> right to be free from cruel and unusual punishment.[6]

FP at 5, 5(a)-5(c), and 6.

IV. EXHAUSTION OF STATE COURT REMEDIES

Zaiontz raised claims 1 and 2 in her state habeas corpus applications, *Ex parte Zaiontz* Appl. No. 29,570-01 at 7-8, and as such, Zaiontz has exhausted her state remedies as required by 28 U.S.C. § 2254(b) and (c) as to claims 1 and 2. *Thomas v. Collins,* 919 F.2d 333, 334 (5th Cir. 1990), *cert. denied*, 501 U.S. 1235, 111 S. Ct. 2862 (1991).

Zaiontz did not raise claim 3 on appeal or in her state habeas application. However, a federal habeas court may find unexhausted claims to be procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S. Ct. 2546, 2557

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[6] The continued incarceration of an innocent person may violate the Eighth Amendment. *See Herrera v. Collins*, 506 U.S. 309, 432 n. 2, 113 S. Ct. 853, 877 n. 2 (1993) (Blackman, J., dissenting). On its own, however, a claim of actual innocence based on newly discovered evidence does not state a claim for relief under § 2254. *Herrera*, 506 U.S. at 400, 113 S. Ct. at 860. *See also Lucas v. Johnson*, 132 F.3d 1069, 1075 (5th Cir.), *pet. for cert. dism'd*, 524 U.S. 965, 119 S. Ct. 4 (1998) (claim of actual innocence based on newly discovered evidence not cognizable on habeas corpus review); *Jacobs v. Scott*, 31 F.3d 1319, 1324 (5th Cir. 1994) (same). Here, petitioner does not claim that newly discovered evidence establishes her factual innocence; rather, she argues that she lacked the intent necessary to commit the crime of which she was convicted and thus is legally innocent such that her continued incarceration is unconstitutional. Because this Eighth Amendment claim is both procedurally barred from federal review and is time barred, the Court need not decide whether such a claim may be pursued in a habeas corpus proceeding.

(1991). The normal rule, that a state court must explicitly apply a procedural bar to preclude federal review, does not apply to cases where a petitioner fails to exhaust his set court remedies and the state court to which he would be required to present his unexhausted claims would now find those claims to be procedurally barred. *Coleman*, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1. In such cases, the federal procedural default doctrine precludes federal habeas corpus review. *Id.*; see also *Gray v. Netherland*, 518 U.S. 152, 161, 116 S. Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 298-99, 109 S. Ct. 1060, 1069 (1989) (finding an unexhausted claim to be procedurally barred); *Nichols v. Scott*, 69 F.3d 1255, 1280 n.48 (5th Cir. 1995) (finding several unexhausted claims would be barred by the Texas contemporaneous objection rule; thus, federal habeas corpus review was procedurally barred), *cert. denied*, 116 S. Ct. 2559 (1996).

Here, Zaiontz failed to exhaust claim 3, but if she attempted to present this claim to the Texas Court of Criminal Appeals in another state writ application, it would be procedurally barred under the Texas abuse of the writ doctrine. Tex. Code Crim.P. art 11.07 § 4 (Vernon Supp. 2001)[7]; See also *Ex parte Barber*, 879 S.W.2d 889, 891 n.1 (Tex. Crim. App. 1994). Upon her return to federal court, Zaiontz' claim 3 would be barred from federal

[7] Texas' abuse of the writ doctrine prohibits a successive habeas corpus application unless the petitioner can establish that the current claims could not have been presented in the original petition. Tex. Code Crim. P. art. 11.07 § 4 (Vernon Supp. 2001). Zaiontz' actual innocence claim, predicated not on newly discovered evidence but on the lack of requisite intent, was available to her at the time she filed her first state habeas corpus application and could have been presented then.

habeas review under the federal procedural default doctrine. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (*per curiam*) (finding the Texas abuse of the writ doctrine to be an adequate procedural bar for purposes of federal habeas review), *cert. denied,* 515 U.S. 1153, 115 S. Ct. 2603 (1995). Accordingly, based on the Texas abuse of the writ doctrine, now codified at Tex. Code. Crim. P. art. 11.07 § 4, Zaiontz' unexhausted claim 3 is barred from federal review.

To overcome this procedural bar, Zaiontz must demonstrate either cause and prejudice for her default, or that a fundamental miscarriage of justice would result from this court's refusal to consider her claim. *Fearance*, 56 F.3d at 642, citing *Coleman*, 501 U.S. at 750-51, 111 S. Ct. at 2565. This she cannot do. Zaiontz clearly had the opportunity to raise claim 3 on direct appeal or in her state habeas corpus application and failed to do so. She does not even attempt to explain this failure. Instead, she argues that exhaustion of the eighth Amendment claim is not required because it turns on the viability of Ground #1 (insufficiency of the evidence), which was exhausted. See DE #12 at 18. This argument is without merit. The mere fact that an unexhausted claim is "related to" an exhausted claim does not excuse exhaustion. *See Galtieri v. Wainwright*, 582 F.2d 348, 359 (5th Cir. 1978) (complete exhaustion of all claims required). Moreover, as discussed below, Zaiontz fails to allege any facts to suggest that a fundamental miscarriage of justice would result from failure to consider claim 3 now. As such, claim 3 is not cognizable in federal writ proceedings. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991) (federal habeas review of defaulted claim is barred unless

petitioner can demonstrate that failure to consider claim will result in a fundamental miscarriage of justice).

V. RESPONDENT'S MOTION TO DISMISS AS TIME BARRED

A. AEDPA's statute of limitations.

Under the 1996 amendments to the federal habeas corpus statute, which took effect April 24, 1996,[8] state prisoners have a one-year statute of limitations within which to file a petition for federal habeas corpus relief. Limitations runs [sic] from the latest of four alternative dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the Untied States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made

[8] These amendments are embodied in the Antiterrorism and Effective Death Penalty Act of 1995. ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Zaiontz' federal habeas corpus petition, executed on April 6, 2001, is subject to the provisions of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059 (1997).

retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1) (1996).

In this case, Zaiontz' conviction was affirmed by the Thirteenth Court of Appeals on May 1, 1986. *Ex parte Zaiontz*, Appl. No. 29, 570-01 89-92. Her conviction became final when the time for filing a petition for discretionary review expired, that is, May 31, 1986, thirty days after the judgment of the Court of Appeals was rendered. Tex. R. App. P. 202(b) (Vernon's 1991), now Tex. R. App. P. 68.2(a). Thus, Zaiontz' conviction became final prior to AEDPA's enactment on April 24, 1996.

In cases where limitations has run prior to AEDPA's enactment, the petitioner is entitled to a one-year post-AEDPA filing period commencing on April 24, 1996. *United States v. Flores*, 135 F.3d 1000, 1005 (5th Cir. 1998). In addition, the one-year post-AEDPA grace period is subject to the tolling provisions of § 2244(d)(2). *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998). Applying the reasoning of *Flores* and *Fields*, Zaiontz had one year from AEDPA's effective date, that is until April 24, 1997, plus any statutory "tolling period," within which to file her federal habeas petition. As noted, the instant petition is deemed filed as of April 6, 2001.

Zaiontz' state habeas corpus application challenging her conviction was filed on August 17, 1995, and denied on August 18, 1995. *Ex parte Zaiontz* Appl. No. 29,570-01 at 2, cover. Because it was denied prior to the limitations

period beginning on April 24, 1996, it was not pending during the grace period and cannot serve to toll limitations. 28 U.S.C. § 2244(d)(2).

Zaiontz' federal petition is time barred.[9]

B. Zaiontz' response.

In her response (DE #12), Zaiontz argues that respondent has failed to address the issue of exhaustion and "should be admonished by the Court to immediately comply with the Court's Order and brief the exhaustion issue."[10] DE #12 at 2.

Zaiontz' focus on exhaustion is misplaced in the context of respondent's motion to dismiss the petition as time barred. Exhaustion of state court remedies does not serve to delay the date on which a judgment become [sic] final, but merely tolls the running of limitations. *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001). Here, even if Zaiontz had not exhausted her state court remedies and was required to pursue her claims in state court, it would

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[9] The bar would include not only claims 1 and 2, but would also include claim 3, should the Court determine that claim 3 is not subject to the federal procedural default doctrine. Claim 3 turns on whether she is legally innocent, not factually innocent, and thus was known to her at the time of her conviction.

[10] The order to which Zaiontz is referring is the Court's Order for Service of Process (DE #8) which details, *inter alia*, the information to be included in respondent's answer. Paragraph 3(d) of the order for Service of Process requires that respondent's answer shall provide "[a] statement as to whether Petitioner has exhausted all state remedies, either by appeal or collateral attack." DE #8 at 2, ¶3(d).

not change the date on which her conviction became final or affect the running of limitations. *Id.*

Moreover, as discussed above, Zaiontz raised claim 1 (requisite state of mind to commit murder) and claim 2 (lesser included offense charge) in her state habeas corpus application and as such, they are exhausted. Compare FP at 5-5(c) with *Ex parte Zaiontz* Appl. No. 29,570-01 at 7-8. Zaiontz did not raise her Eighth Amendment claim on direct appeal or in her state habeas corpus application; however, because she would be barred from raising this claim in a successive state habeas application, exhaustion is satisfied because no state remedy remains. *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S. Ct. 2546, 2555 (1991) ("[a] habeas petitioner who has defaulted on his federal claims in state court meets the technical requirements for exhaustion: there are no state remedies any longer 'available' to him.").

C. Miscarriage of justice exception.

Petitioner also argues that the miscarriage of justice (actual innocence) exception bars application of AEDPA's limitations.

To avoid such a miscarriage of justice as the conviction of an innocent person, a habeas petitioner may seek review of claims otherwise barred from review by making a credible showing of "actual innocence." *See Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514 (1992) ("actual innocence" in context of death penalty). Significantly, the term "actual innocence" means factual as opposed to legal innocence. *Id.* at 347, 111 S. Ct. at 2523. Legal innocence arises whenever a constitutional violation by itself

requires reversal of the conviction whereas actual innocence means the person did not commit the crime. *Id.*

A capital defendant whose claim is procedurally barred may nevertheless have the claim reviewed if he shows that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995), citing *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986). The focus of the inquiry is on actual innocence. *Id.* To be credible, a claim of actual innocence should be supported by new, reliable evidence that was not presented at trial, *Id.* at 327-28, 115 S. Ct. at 867, or evidence that was wrongly excluded at trial. *Id.* But the claim of actual innocence is only a gateway through which the petitioner must first pass in order to have the underlying constitutional claim heard; a claim of actual innocence is not itself a constitutional claim. *Herrera v. Collins*, 506 U.S. 309, 400, 113 S. Ct. 853, 860 (1993).

In her Memorandum of Points and Authorities (DE #9), Zaiontz argues that she is entitled to a merits determination of her habeas corpus claims, notwithstanding that the claims are otherwise barred by procedural default and/or limitations, because "she is innocent of the crime for which she is convicted." DE #9 at 2, 11-14. Zaiontz also argues that the miscarriage of justice exception applies to § 2244 because the failure to reach the merits of her claim would violate the Suspension Clause[11] of the United States

[11] The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Constitution. DE #9 at 12-14. She relies on a California district court decision, *United States v. Zuno-Arce*, 25 F.Supp.2d 1087, 1099 (C.D. Cal. 1998), *aff'd*, 245 F.3d 1108 (9th Cir. 2001), in which the district court held that the miscarriage of justice exception is a means of considering evidence and constitutional claims otherwise barred by § 2244(d).

1. Miscarriage of Justice and limitations.

A number of appellate courts have considered without deciding whether the miscarriage of justice exception would allow consideration of claims of actual innocence otherwise barred by AEDPA's limitations. For example, in *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1218 (11th Cir. 2000), the Eleventh Circuit stated that the restrictions of § 2244(d), when applied to a claim of actual innocence, could raise a question whether the writ of habeas corpus has been suspended in violation of article 1, section 9, clause 2, of the United States Constitution:

> Where the petitioner can show actual innocence and § 2244(d)'s limitation period has expired, does the bar to filing a first federal petition constitute an unconstitutional suspension of the writ of habeas corpus? The question raises concerns because of the inherent injustice that results from the conviction of an innocent person and the technological advances that can provide compelling evidence of a person's innocence.

Wyzylowski, 226 F.3d at 1218.

The Eleventh Circuit concluded that the factual issue of whether a petitioner can make a showing of actual innocence should first be addressed before turning to the

constitutional issue of whether the Suspension Clause requires an exception for actual innocence. *Wyzykowski*, 226 F.3d at 1218. "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Id.*, quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582, 99 S. Ct. 1355 (1979).

Other courts, too, have recognized the possibility that the miscarriage of justice exception applies to petitions that are otherwise time barred under § 2244(d), but have avoided the issue by finding that the petitioner failed to demonstrate actual innocence. *See e.g., Lucidore v. New York State Div. of Parole*, 209 F.3d 107 (2nd Cir.), *cert. denied*, 531 U.S. 873, 121 S. Ct. 175 (2000) (holding that because petitioner failed to demonstrate actual innocence, the question of whether the Constitution requires an "actual innocence" exception to AEDPA's statute of limitations need not be reached); *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (per curiam) ("The 1-year limitations period of the AEDPA does not violate the Suspension Clause unless it renders the habeas corpus remedy inadequate or ineffective to test the legality of the detention. Molo [who failed to show factual innocence] has not shown how the limitations period made the habeas corpus remedy inadequate or ineffective for him, since nothing prevented him from filing a petition before limitations expired"); *Turner v. Johnson*, 177 F.3d 390, 392-93 (5th Cir.) (per curiam), *cert. denied*, 120 S. Ct. 504 (1999) ("Turner cannot show that the limitations period has rendered his habeas remedy inadequate or ineffective. We therefore reject Turner's claim that § 2244 is unconstitutional.").

Thus, it must first be considered whether Zaiontz' claim of actual innocence is sufficient to permit consideration of the petition on its merits despite its untimeliness.

2. Support for claim of actual innocence.

To support her claim of actual innocence, Zaiontz argues that the evidence at trial failed to establish the requisite specific intent to convict her of capital murder. Following a recitation of the testimony concerning her involvement in the crime (DE #9 at 2-9), petitioner notes that one participant testified "no one thought [the victim] was going to get shot." *Id.* At 9. She also notes that the prosecutor never argued that he had proved Zaiontz' intent to kill the victim. *Id.*

Petitioner falls woefully short of her burden to make a credible showing of actual innocence. First, as noted *supra*, the miscarriage of justice exception is concerned with *actual* as compared to *legal* innocence. *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S. Ct. 1489, 1502 (1998). The breadth of the exception is extremely narrow and in order "[t]o be credible, a claim of actual innocence must be based on reliable evidence not presented at trial." *Id.*, quoting *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 865 (1995). "If the petitioner asserts his actual innocence of the underlying crime, he must show it is more likely than not that no reasonable juror would have convicted him in light of the new evidence presented in his habeas corpus petition." *Calderon*, 523 U.S. at 559-60, 118 S. Ct. at 1503.

Zaiontz has not met this burden. In fact, as noted, Zaiontz does not raise a claim of factual innocence, but of legal innocence; she argues that the state failed to prove

she had the intent to commit murder such that she is "innocent" of capital murder. DE #9 at 17. *See Rodriguez v. Johnson*, 104 F.3d 694 (5th Cir.), *cert. denied*, 520 U.S. 1267, 117 S. Ct. 2438 (1997) (petitioner challenging *inter alia* intent element in jury instructions failed to present new facts but simply raised new legal arguments and did not satisfy the miscarriage of justice exception). Zaiontz offers no newly discovered evidence, nor any evidence wrongfully excluded at trial. She relies solely on the evidence in the trial record. Her claim that the State failed to include a lesser included offense instruction raises a constitutional violation,[12] but without a showing of factual innocence sufficient to pass the "gateway," the claim cannot be considered. *Herrera,* 506 U.S. at 309, 113 S. Ct. at 860. The miscarriage of justice exception does not apply to her claims. *Calderon,* 523 U.S. at 558, 118 S. Ct. at 1502.

Nor does Zaiontz' claim of actual innocence give rise to tolling considerations. See *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir.), *cert. denied*, 531 U.S. 1035, 121 S. Ct. 622 (2000) (petitioner's unsupported actual innocence claim does not constitute grounds for equitable tolling "given that many prisoners maintain they are innocent."). Her petition is time barred and Zaiontz has presented no adequate rationale for tolling the limitations period.

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[12] In capital cases, the failure to include a lesser included offense instruction raises a constitutional violation. *Hopper v. Evans*, 456 U.S. 605, 102 S. Ct. 2049 (1982); *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980). Cf. *Alexander v. McCotter*, 775 F.2d 595, 601 (5th Cir. 1985) ("[t]here is uncertainty in this Circuit as to whether due process ever requires a lesser included offense instruction in non-capital cases.").

Furthermore, she has failed to demonstrate that the dismissal of her petition will result in a fundamental miscarriage of justice. It is recommended her claims be dismissed as time barred.

VI. RECOMMENDATION

For the foregoing reasons, it is recommended that respondent's motion to dismiss be granted and that Zaiontz' claims 1 and 2 be dismissed as untimely. 28 U.S.C. § 2244(d). It is further recommended that claim 3 be dismissed as procedurally barred from federal review, or, in the alternative, as time barred.

Respectfully submitted this 4th day of December, 2001.

/s/ Jane Cooper-Hill
JANE COOPER-HILL
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **TEN (10) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(C), Rule 8(b)(3), Rules Governing § 2254 Cases, and Article IV, General Order No. 80-5, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a

magistrate judge's report and recommendation within **TEN (10) DAYS** after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Services Auto. Ass'n*, 79 F.2d 1415 (5th Cir. 1996) (en banc).

APPENDIX G

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LORA LEE ZAIONTZ, Petitioner, vs. JANIE COCKRELL, Director of the Texas Criminal Justice Institutional Division, Respondent.	Case No.: 01-CV00172 PETITIONER'S OBJECTION UNDER 28 U.S.C. { 636(b) TO THE MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION AS ENTERED 12/07/01

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LORA LEE ZAIONTZ, Petitioner, vs. JANIE COCKRELL, Director of the Texas Criminal Justice Institutional Division, Respondent.	Case No.: 01-CV00172 PETITIONER'S OBJECTION UNDER 28 U.S.C. { 636(b) TO THE MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION AS ENTERED 12/07/01

INTRODUCTION

Magistrate Judge Jane Cooper-Hill agrees that a showing of "actual innocence" within the meaning of the miscarriage of justice exception of *Schlup v. Delo* (1995) 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851 and *Murray v. Carrier* (1986) 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 would exempt Petitioner from the one-year term of limitations. (Magistrate Judge's Memorandum and Recommendation on Respondent's Motion to Dismiss (hereinafter "DE #15"), pp. 10-11; see also DE #9, pp. 12-15 (Petitioner's Memorandum of Points and Authorities in Support of Petition filed 7/11/01). However, the Magistrate

Judge asserts that this principle of law does not avail Petitioner since:

(1) a valid claim of insufficiency of evidence as to an element of a crime only establishes "legal innocence" – not the "actual innocence" required under the miscarriage o [sic] of justice exception (DE #15, pp. 9, 12);

(2) to properly plead the miscarriage of justice exception one must "offer [ ] newly discovered evidence or [ ] evidence wrongfully excluded at trial" – and Petitioner has done neither (DE #15, pp. 9, 12); and

(3) the third claim of the petition was not presented to the Texas Court of Criminal Appeals and should be considered procedurally defaulted under Texas Law (DE #15, pp. 4-6, 13).

Petitioner objects to these three recommendations for the following reasons:

OBJECTION #1

A CONVICTION OBTAINED ON CONSTITUTIONALLY INSUFFICIENT EVIDENCE IPSO FACTO ESTABLISHES "ACTUAL INNOCENCE" WITHIN THE MEANING OF THE FEDERAL MISCARRIAGE OF JUSTICE EXCEPTION UNLESS THE STATE OFFERS EXTRA-RECORD EVIDENCE

A. How the Actual Innocence Gateway Standard is Related to, and Derived from, the Constitutionality Standard for Insufficiency of the Evidence under Jackson v. Virginia.

The United States Supreme Court has discussed at length the interrelationship of the federal insufficiency of evidence standard under *Jackson v. Virginia* (1979) 443

U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 and the gateway "actual innocence" standard under *Schlup v. Delo*, supra, and *Sawyer v. Whitley* (1992) 505 U.S. 333, 120 L.Ed.2d 269, 112 S.Ct. 2514:

> [In *Sawyer v. Whitley*, 505 U.S. 333, 336 . . .] [T]he Court held that a habeas petitioner "must show by *clear and convincing* evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty".38
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> 38. Even the high standard of proof set forth in *Sawyer* falls short of the *Jackson* standard governing habeas review of claims of insufficiency of the evidence. See *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2792, 61 L.Ed.2d 560 (1979) ("[N]o rationale [sic] trier of fact *could* have found proof of guilt beyond a reasonable doubt.")

(*Schlup v. Delo*, supra, 513 U.S. at 323, fn. 38 & related text.)

> We note finally that the *Carrier* standard [as reaffirmed in *Schlup*] requires a petitioner to show that it is more likely than not that "no reasonable juror" would have convicted him. . . . Though the *Carrier* standard requires a substantial showing, it is by no means equivalent to the standard of *Jackson v. Virginia*, . . . that governs review of claims of insufficient evidence. The *Jackson* standard, which focuses on whether any rationale [sic] juror could have convicted, looks to whether there is sufficient evidence which, if credited, could support the conviction. The *Jackson* standard thus differs in at least two important ways from the *Carrier* standard. First, under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of

> review. In contrast, under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments. Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson* the use of the word "could" focuses the inquiry on the power of the trier of fact to reach its conclusion. Under *Carrier*, the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact. . . . Thus, though under *Jackson* the mere existence of sufficient evidence to convict would be determinative of petitioner's claim, that is not true under *Carrier*.

(*Schlup v. Delo*, supra, 513 U.S. at 329-330.)

From these passages, we can see that the United States Supreme Court considers the *Sawyer* and *Carrier* standards to be derived from, but far more lenient than, the *Jackson* standard. Logically then, when one satisfies the latter, one has satisfied the former.

The interrelationship of the standards has not been lost upon the Fifth Circuit:

> The concept of "innocence of the crime" means that the constitutional violation resulted in the conviction of one who was innocent of the *particular* crime for which he or she was charged and convicted – not that the petitioner was not present at the scene of the offense. *Kuhlmann's* key language is largely a quote from Judge Friendly's article advocating an actual innocence requirement in habeas: (emphasis original)

> "A prisoner does not make a colorable showing of innocence 'by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained.' Rather, the prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence." (emphasis original)
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> 477 U.S. at 455, n. 17, . . . (internal citations omitted; emphasis in original) . . . This seems to us to be akin to the standard in *Jackson v. Virginia*, 443 U.S. 307. . . . , under which a person cannot be guilty of a crime if a reasonable jury would entertain a reasonable doubt about *any element* (emphasis added) of the crime.

(*Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 860, fn. 21, cert. den. 507 U.S. 1007.)

Indeed, the way Justice O'Connor, a necessary fifth vote in *Schlep v. Delo*, supra, expressed her understanding of the 'actual innocence' gateway is that it is reserved for "extraordinary case[s]" where there is not "any juror who, acting reasonably, would have found the petitioner guilty beyond a reasonable doubt." (*Schlup v. Delo*, supra, 513 U.S. at 333 (O'Conner, J., concurring; internal quotations omitted and emphasis added). Thus, the standard of review for the 'gateway' claims and *Jackson* claims are

phrased in the same terms, the only difference being that the gateway standard is designed to be more inclusive and lenient – both in terms of the burden of persuasion and the scope of evidence deemed relevant.

There is only one circumstance in which satisfaction of the *Jackson* standard as to an element of the crime would not be sufficient to satisfy the gateway standard as well. It is where the State responds to an attempt to use the miscarriage of justice gateway with *extra-record* evidence that show that the petitioner, though convicted on insufficient evidence, would likely be found guilty beyond a reasonable doubt if the matter was reexamined. (*Bousley v. United States* (1998) 523 U.S. 614, 623-624, 140 L.Ed.2d 828, 118 S.Ct. 1604; *Schlup v. Delo*, supra, 513 U.S. 327-328.)

Respondent in this case had the prerogative to make an extra-record showing to overcome the insufficiency of their case that is plain on the face of the trial record, but they failed to avail themselves of that opportunity. (*Ibid.*)

Consider for a moment the case of *Bousley v. United States*, supra, 523 U.S. at 623-624. The holding in that case cannot be reconciled with the Magistrate Judge's belief that constitutional insufficiency of evidence presented at trial does not suffice to invoke the 'actual innocence' gateway. In *Bousley*, the United States Supreme Court remanded the case for a hearing in which the government would be allowed "to rebut" the legally insufficient evidence of *Bousley's* "use" of a firearm that was plain on the record at trial. (*Id.* 523 U.S. at 617, 623-624 [noting that storing a weapon near drugs or drug proceeds was insufficient under 18 U.S.C. (924(c)(1) because that

statute required the government to show "active employment" of the firearm]. Although the *Bousley* Court allowed the government on remand to use evidence outside the existing trial record to rebut *Bousley's* showing of "legal insufficiency" on the face of the trial record, it is clear from the holding that if the government failed to rebut *Bousley's* showing then he would be entitled to relief. Thus, *Bousley* demonstrates that legally insufficient evidence, to the extent that it remains unrebutted, qualifies under the actual innocence gateway.

A close analysis of the United States Supreme Court's adoption of the gateway to sentencing determinations in death penalty trials will reinforce Petitioner's point. In *Sawyer v. Whitley* (1992) 505 U.S. 333, 120 L.Ed.2d 269, 112 S.Ct. 2514, the High Court remarked that "eligibility" for the miscarriage of justice/gateway "must focus on those *elements* that render a defendant eligible for the death penalty, *and not on additional mitigating evidence* that was prevented from being introduced as a result of a claimed constitutional error. (Emphasis added) (*Id.* 505 U.S. at 347.) Citing with approval a decision of the Eleventh Circuit, the United States Supreme Court adopted the idea that a death penalty prisoner "must show that absent the alleged constitutional error, the jury would have *lacked the discretion* to impose the death penalty. . . . " (Emphasis added) (*Id.* 505 U.S. at 347, fn. 15.) In another passage of the opinion the Court remarked:

> Sensible meaning is given to the term "innocent of the death penalty" by allowing. . . . a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.

(*Id.* 505 U.S. at 345, fn. 12 and related text.)

Thus, the phrasing of the actual innocence gateway for death penalty sentencing determinations harkens unmistakably to the *Jackson v. Virginia* standard. Petitioner is required to demonstrate that eligibility for that penalty "*had not*" (presumably, given the past tense) been demonstrated at trial and that therefore the jury lacked the power to impose that penalty.

Given the above analysis, as buttressed by the holdings in *Bousely* [sic] and *Sawyer*, it is clear that the Magistrate Judge has misread or misapplied *Schlup v. Delo*. While it is true that "legal insufficiency" alone does not guarantee a petitioner's right of passage through the 'actual innocence' gateway, this is only because the gateway gives the government the right to rebut such insufficiency with extra-record evidence. The holdings of the United States Supreme Court are misconstrued if they are read to exclude those whose demonstration of legal insufficiency of an element of the crime or sentence remains unrebutted.

B. Seeking Clarity on the Distinction Between "Legal Innocence" and "Actual Innocence" as Those Terms are Used by the United States Supreme Court.

Much mischief has already been done in this case by too loose a sense of the meaning of the terms "legal innocence" and "actual innocence". The United States Supreme Court in *Schlup v. Delo*, supra, tried to demystify these terms:

> The *Carrier* standard requires the habeas petitioner to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent". . . . As used in *Carrier*,

> actual innocence is closely related to the definition set forth by this Court in *Sawyer*. To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. . . . The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial".
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> *The consideration in federal habeas proceedings of a broader array of evidence does not modify the essential meaning of "innocence". The Carrier standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt. See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). . . . Thus, whether a court is assessing eligibility for the death penalty under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under *Carrier*, the analysis must incorporate the understanding *that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence*."

(*Schlup v. Delo*, supra, 513 U.S. at 327-328; emphasis added.)

It is the selfsame *In re Winship*, supra, standard which is offended by a conviction on insufficient evidence. As the United States Supreme Court has stated, a person who has been convicted on insufficient evidence is

innocent the eyes of the law – utterly so. A finding of insufficiency of the evidence on appeal necessitates the entry of a judgment of acquittal:

> In short, reversal for trial error, *as distinguished from evidentiary insufficiency*, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. . . .
>
> *The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial,. . . . [S]uch an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury.*". . . .
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> [O]nce the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. (Emphasis added) of acquittal. *Burks v. United States*, 437 U.S. 1, 15-16, 18, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978)

When *Burks v. Untied States*, supra, is read in juxtaposition with the High Court's 'actual innocence' gateway jurisprudence, it is clear that a claim under the Jackson standard is *the one* constitutional violation which, when proven and allowed by the State to stand unrebutted in the post-conviction forum, presupposes a finding of 'actual innocence'.

While as the *Bousley* Court noted, 'actual innocence' does not mean "mere legal insufficiency" – where the State does not respond in the post-conviction setting with additional evidence, legal insufficiency will prevail under the gateway standard. (*Bousley v. United States*; supra,

523 U.S. at 623-624; *Schlup v. Delo*, supra, 513 U.S. at 330-332.)

C. Does a Person who Proves the Insufficiency of the State's Case as to a Single Element of an Offense, Qualify Under the 'Actual Innocence' Gateway?

Petitioner has already quoted from a Fifth Circuit case which directly addressed this issue. (See supra, pp. 5(1)-5(28) [quoting from *Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 860, fn. 21 ("The concept of 'innocence of the crime' means that the constitutional violation resulted in the conviction of one who was innocent of the *particular* crime for which he or she was charged and convicted – not that the petitioner was not present at the scene of the offense."; emphasis original)]; see also *Sawyer v. Whitley*, supra, 505 U.S. at 342, fn. 8, 347, 349-350 [applying the gateway standard to "those elements which render a defendant eligible for the death penalty"]; *Bousley v. United States*, supra, 523 U.S. 614, 623-624 [applying the gateway where the plea sentencing transcript contained insufficient evidence of the "active employment" element of 18 U.S.C. { 924(c)(1)]; *Jones v. Delo* (8th Cir. 1995) 56 F.3d 878, 883 [negation of deliberation element brings a petitioner within the miscarriage of justice exception]; *Paradis v. Arave* (9th Cir. 1997) 130 F.3d 385, 396 [new evidence undermines trial court's jurisdiction thus qualifying for gateway].)

The Magistrate Judge relies on *Rodriguez v. Johnson* (5th Cir. 1997) 104 F.3d 694, cert den. 520 U.S. 1267 (1997) for the proposition that a challenge to the "intent element *in jury instructions* failed to .... satisfy the miscarriage of justice exception". (DE #15, p. 12.) However, the case is irrelevant. A challenge to the terms of the

intent element *in jury instructions* is not comparable to Petitioner's challenge to the sufficiency of *the evidentiary proof* at trial of the intent element of capital murder. The former has nothing to do with innocence. The failure to give any instructions at trial would not implicate the miscarriage of justice exception. The omission or misdescription of an element of a crime is trial error. (*Neder v. United States* (1999) 527 U.S. 1, 9-10, 144 L.Ed.2d 35, 119 S.Ct. 1827.) "[T]rial error, as distinguished from evidentiary insufficiency . . . implies nothing with respect to the guilt or innocence of the defendant." (*Burks v. United States*, supra, 437 U.S. at 15.) Thus, the Magistrate Judge's reliance on *Rodriguez v. Johnson* is misplaced. The authorities cited by Petitioner are, in contrast, directly on point and are dispositive of the issue. 'Actual innocence' can be established through unrebutted proof of the insufficiency of the State's proof at trial as to a single element.

D. Is the Offer of New Evidence or the Identification of Wrongfully Excluded Evidence a Prerequisite to Invocation of the Gateway for Actual Innocence?

The mistaken idea that a petitioner must support a claim under color of the actual innocence gateway with newly discovered or wrongly excluded evidence is rooted in an oftparaphrased passage from *Schlup v. Delo*, supra, one that – when read carefully and in context – does not support this construction at all:

> Though challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, *experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare*. [citation omitted] *To be credible*,

> such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial. (Emphasis added)

(*Schlup v. Delo*, supra, 513 U.S. at 324.)

The Court's remark that "to be credible" a claim of innocence "requires petitioner to support his allegations . . . with new reliable evidence" is in juxtaposition to the preceding sentence, which indicates that constitutional error, alone, *rarely* has been shown to cause the conviction of an innocent person. The United States Supreme Court clearly did not mean to establish a rule which would bar such "extremely rare" cases from relief. Indeed, in *Bousley v. United States*, supra, 523 U.S. at 623-624 – as Petitioner has already established – the High Court specifically granted access to the actual innocence gateway to a petitioner who offered nothing more in support of his claim than his sentencing transcript.

A review of the philosophical underpinnings of the 'actual innocence' gateway will more amply demonstrate Petitioner's point.

"The . . . fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." (*Herrera v. Collins* (1993) 506 U.S. 390, 404, 122 L.Ed.2d 203, 113 S.Ct. 853 [quoting *McClesky v. Zant* (1991) 499 U.S. 467, 502, 113 L.Ed.2d 517, 111 S.Ct. 1454]. The factors that justify procedural limitations on delayed, abusive, or successive

petitions do not logically apply to first-time federal petitioners who are espousing their innocence under color of the *Jackson v. Virginia* standard. Sufficiency of evidence claims are *sui generis*. They are the only constitutional claims which, when proven, foreclose retrial and require the entry of a judgment of acquittal. (*Burks v. United States*, supra, 437 U.S., at 15-18.) Indeed, the United States Supreme Court has said that in such instances, the petitioner's case should never "have even been *submitted* to the jury". (Emphasis original) (*Id.* at 16. (If one can be more innocent in terms of the *In re Winship* standard – upon which access to the gateway turns (see supra, pp. 9-12) – it certainly is not apparent how.

The jurisprudence of the United States Supreme Court justifies its procedural bars on several grounds. *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 452, 91 L.Ed.2d 364, 106 S.Ct. 2616, the High Court remarked:

> [A] prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated. That interest does not extend, however, *to prisoners whose guilt is conceded or plain.* (Emphasis added)

(*Kuhlmann v. Wilson*, supra, 477 U.S. at 452.) Militating against consideration of delayed, abusive, or successive petitions on their merits are several legitimate State interests:

(1) "Availability of unlimited federal collateral review *to guilty defendants* frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that person contemplating criminal activity believe

there is a possibility that they will escape punishment through repetitive collateral attacks."

(Emphasis added) (*Kuhlmann v. Wilson*, supra, 477 U.S. at 452-453.)

Obviously, this rationale does not apply to defendants who are plainly innocent of the crime for which they were punished. The State has no legitimate right to gratuitously 'make an example' of a person innocent of a given crime so as to deter others from committing that crime.

(2) "Similarly, finality serves the State's goal of rehabilitating those who commit crimes because [r]ehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation'." (*Id.* at 453; see also *McClesky v. Zant*, supra, 499 U.S. at 490-491.)

This rationale does not address conditions extant in the case of a person who was convicted on insufficient evidence. That person *is innocent* in the eyes of the law and is therefore in no need of rehabilitation as to the crime for which judgment was erroneously entered. In terms of this case, it is irrational to wish to scourge Lora Lee Zaiontz for having an intent consistent with capital murder when, fairly considered, she is "actually innocent" of that intent and that crime.

(3) "Finality also serves the State's legitimate punitive interest. When a prisoner is freed on a successive petition, often many years

after his crime, the State may be unable successfully to retry him. [citation omitted] This result is unacceptable if the State must forgo conviction *of a guilty* defendant through the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time that invariably attends collateral attack." (*Kuhlmann v. Wilson*, supra, 477 U.S. at 453; *McClesky v. Zant*, supra, 499 U.S. at 491.)

This factor, also, has no application to a sufficiency of evidence attack, which is brought entirely on the trial record, and which, where successful, precludes even the possibility of retrial. (*Burks v. United States*, supra, 437 U.S. at 16.

(4) "Unlimited availability of federal collateral attack burdens our criminal justice system as *successive* petitions divert the 'time of judges, prosecutors, and lawyers' . . . " (Emphasis added) (*Kuhlmann v. Wilson*, supra, 477 U.S., at 453, fn. 16.)

This factor is irrelevant to *this case* because this is Petitioner's *first* federal petition. It is not successive.

(5) "Finality has special importance in the context of a federal attack on a state conviction. [citations omitted] Reexamination of state convictions on federal habeas 'frustrate[s] . . . both the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. [citations omitted] Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but

the power of a State to pass laws means little if the State cannot enforce them." (*McClesky v. Zant*, supra, 499 U.S. at 491; see also *Kuhlmann v. Wilson*, supra, 477 U.S. at 453, fn. 16.)

This factor does not bear on *this case* because Texas can have no legitimate interest in enforcing laws on people who have been vindicated at trial. The *Jackson v. Virginia* standard is objective. It protects the State's legitimate interest in its process and its definition of crimes by making every reasonable assumption in favor of the verdict:

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [citation omitted] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The [*Jackson*] criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (Emphasis original.) (*Jackson v. Virginia*, supra, 443 U.S. at 319.)

From the above analysis we can see that the "equitable discretion" (*Herrera v. Collins*, supra, 506 U.S. at 404) of the United States Supreme Court must embrace instances where a petitioner can satisfy the *Jackson v. Virginia* standard, no matter how long their federal petition is delayed. The philosophical considerations which give rise to the gateway standard apply with all the greater force to one who is "actually innocent" on the face of the trial record. By contrast, litigants who bring delayed or successive petitions which rely on constitutional violations supported by extra-record facts pose far more unsettling procedural questions. Petitions supported by facts never considered by the original trier of fact are heir to all the countervailing ills described in the preceding pages. Nevertheless, the United States Supreme Court deems that they should be heard on the merits because "the need in a free society for an additional safeguard against compelling an innocent [person] to suffer an unconstitutional loss of liberty" outranks all other concerns. (*Kuhlmann v. Wilson*, supra, 477 U.S. at 453, fn. 16.) A fortiori, where, as here, the societal and individual imperative to free the innocent is not offset by any of the typical disadvantages, the "equitable discretion" of the federal bench must be invoked.

CONCLUSION TO OBJECTION #1

To the extent that isolated phrases in *Schlup v. Delo* suggest that the production of new evidence must be offered to make "credible" a gateway claim, it must be remembered that the Court was examining a case in which such evidence was offered. Such phrases are therefore dicta. Moreover, they are inconsistent with the High

Court's related jurisprudence, most especially that of *Bousley v. United States* and *Sawyer v. Whitley*.

Careful examination of the *Jackson v. Virginia* standard itself, the *Schlup v. Delo* standard, and the philosophical underpinnings of both requires that we conclude that no applicant for procedural relief under the actual innocence gateway is more deserving than one who makes the claim on the unembellished trial record.

> As with many rules of law, multiple repetitions over time may tend to obscure the original purpose of the rule. . . . *Hyde v. Untied* [sic] *States* (1912) 225 U.S. 347, 391 [56 L.Ed. 1114, 1135, 32 S.Ct. 793] (dis. opn. of Holmes, J.) ["'ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis'".]

(*In re Harris* (1993) 5 Cal.4th 813, 826, 21 Cal.Rptr.2d 373, 855 P.2d 391.) The Magistrate Judge has erred in concluding that since Petitioner's claim under color of the miscarriage of justice exception is not 'on all fours' with that in *Schlup v. Delo*, then it is unworthy of the "equitable discretion" of the federal bench under Title 28 of the United States Code, section 2243. Nothing could be further from the truth. Where the factors in Petitioner's case diverge from those of *Schlup v. Delo*, it is all to Petitioner's advantage. No one is more innocent than a person who was entitled to a judgment of acquittal in the first instance. No other type of claim of innocence is less burdensome to the federal judicial system or less of an affront to the legitimate prerogatives of the State. A valid sufficiency of evidence claim is the most simple and compelling miscarriage of justice which can be described. At once, it implicates both the Constitution and actual innocence as

our legal system defines innocence. Lora Lee Zaiontz deserves gateway treatment for her federal petition.

OBJECTION #2

GROUND #3 IS PROCEDURALLY SOUND

Ground #3 of Petitioner's petition is as follows:

> "PETITIONER'S ONGOING INCARCERATION FOR CAPTIAL [sic] MURDER WHEN THE TRIAL RECORD ESTABLISHES THAT THE RELEVANT STATUTE DID NOT PROHIBIT HER CONDUCT IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHT [sic] AMENDMENT. SUPPORTING FACTS: (1) Petitioner reasserts facts 1-4 of Ground #1. (2) The U. S. judicial system is designed to prevent the incarceration of citizens under color of statutes they did not violate. As a result, Petitioner's circumstances are highly unusual. (3) It self-evidently cruel to confiscate the life of a person under authority of a statute which they did not violate. Petitioner's incarceration under the harsh life term associated with Texas Capital Murder shocks the conscience. That term is only supposed to be meted out to those who either intentionally murder or who knowingly aid one who does in certain qualifying circumstances.
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> (4) Petitioner reasserts the facts of Ground #2."

(See DE #1, p. 6.) By its terms, Ground #3 cannot be true unless Ground #1, the insufficiency claim, is valid. It is undisputed that the State of Texas' highest criminal court denied Ground #1.

The federal exhaustion doctrine requires fair presentation of all claims to the highest court of a state, but such presentation is excused under two circumstances:

> (B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(28 U.S.C. { 2254 (b)(1)(B)(i), (ii); see also, Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (3rd ed. 1998, Lexis Press) 23.4(a), p. 902, fn. 18 & related text; DE #9, p. 18.)

The Magistrate Judge cites *Galtieri v. Wainwright* (5th Cir. 1978) 582 F.2d 348, 359 for the proposition that complete exhaustion of all claims is required. (DE #15, pp. 5-6.) However, *Galtieri v. Wainwright* predates the 1996 enactment of Title 28 of the United States Code, section 2254(b)(1)(B)(i), (ii) on which Petitioner relies. To the extent that *Galtieri v. Wainwright* is read as inconsistent with the habeas statute, it is misread. The case did not involve a theory of exhaustion based upon proof of the ineffectiveness of State remedies.

The United States Supreme Court in *Nix v. Whiteside* (1986) 475 U.S. 157, 163, fn. 3, 89 L.Ed.2d 123, 106 S.Ct. 988, recognized that the exhaustion requirement is met when "further proceedings would be futile". No practical purpose would have been served in a separate presentation of Ground #3 to the Texas Court of Criminal Appeals. Ground #3 is a necessarily included and subsidiary legal question to Ground #1. It is therefore unreasonable to describe it as either unexhausted or procedurally defaulted. The nature of a *Jackson v. Virginia* claim is to challenge "a wholly arbitrary deprivation of liberty" – for

that is what a judgment on insufficient evidence is. (*Jackson v. Virginia*, supra, 443 U.S. at 314.) Where punishment is inflicted and liberty arbitrarily abridged, the Eighth Amendment is necessarily violated. (*Beck v. Alabama* (1980) 447 U.S. 625, 632, 638, 65 L.Ed.2d 392, 100 S.Ct. 2382; *Triestman v. United States* (2nd Cir. 1997) 124 F.3d 361, 378-379 [examining the Eighth Amendment implications of denying an exception to 28 U.S.C. { 2244(d) for litigants who are innocent].) Thus, the State of Texas' denial of Ground #1 necessarily encompassed its rejection of the idea that Petitioner's conviction on insufficient evidence constituted an arbitrary and ongoing deprivation of her liberty in violation of the Eighth Amendment.

The procedural default doctrine is meant to ensure that litigants do not evade the exhaustion requirement. (*Coleman v. Thompson* (1991) 501 U.S. 722, 731-732, 115 L.Ed.2d 640, 111 S.Ct. 2546.) Since remedies for all claims of the petition were exhausted through the proper presentation of Grounds #1 and #2 to the Texas Court of Criminal Appeals, the Magistrate Judge's finding of procedural default for Ground #3 is unfounded.

NONETHELESS, THE QUESTION OF PROCEDURAL DEFAULT IS MOOT

The Magistrate Judge recognizes that the merits of Ground #3 would have to be reached under the "actual innocence" gateway, if it were to be made available to Petitioner. (See DE #15, p.6.) To the extent that Petitioner prevails on Objection #1, supra, all of her claims – whether procedurally defaulted or not – must be addressed on the merits. As the United States Supreme Court recognized in *McClesky v. Zant*, supra, 499 U.S. at 494-495, the miscarriage of justice exception acts to revitalize procedurally

defaulted claims. (See also *Murray v. Carrier*, supra, 477 U.S. at 495-496.) However, if Petitioner cannot qualify for the miscarriage of justice exception, then her whole petition is barred under the one-year term of limitations. (28 U.S.C. { 2244(d).) Therefore, the procedural default finding is moot. The viability of the federal petition turns wholly upon whether Petitioner can avail herself of the 'actual innocence' gateway.

OBJECTION #3

PETITIONER ASSERTS THE UNREBUTTED FACTUAL ALLEGATIONS OF THE PETITION AND ITS SUPPORTING MEMORANDUM

Neither Respondent nor the Magistrate Judge disputes that the State of Texas offered constitutionally insufficient evidence of the intent element of Texas' Capital Murder statute. Thus, Petitioner's showing in this regards stands unrebutted. Petitioner reasserts it here. (See Federal Petition [DE #1], pp. 5-6; Petitioner's Memorandum of Points and Authorities in Support of Habeas Petition [DE #9], at pp. 2(22)-11(9).) Petitioner alleged and here reasserts, that not only did the State produce *no* evidence of the requisite intent, but that the evidence that it did present *all* supported a contrary inference. (*Ibid.*)

OBJECTION #4

PETITIONER REASSERTS HER SHOWING AS TO THE OTHER CONSTITUTIONAL RAMIFICATIONS OF ANY FAILURE TO ADDRESS THE GROUNDS OF HER PETITION ON THE MERITS

Petitioner has contended, and here reasserts, that a failure to reach the merits of her claims, given her

innocence of Capital Murder, would violate the Suspension Clause of the United States Constitution and her implicit right to due process. (See U.S. Const., Art. I, sec. 9, clause 2; *Id.* at Fifth and Fourteenth Amendments [due process].) Also, Petitioner contends that if section 2244(d) is construed to bar federal habeas relief to Petitioner, that the law violates Article I, section 8, clause 18 of the United States Constitution as, in that respect, it is neither "necessary" nor "proper" for carrying into execution the powers of Congress. Leaving a person under restraint of a life sentence tailored to capital offenders (and which therefore carries only the most remote possibility of parole) where that sentence arises from a trial in which *only contrary* evidence was presented with respect to the defining element of the offense, is wholly inconsistent with America's conception of ordered liberty and fundamental fairness.

Our Government, as the people have chosen to circumscribe it, cannot legitimize a judgment that neither it nor the jury had the "power" to enter in the first instance. (*Schlup v. Delo*, supra, 513 U.S. at 330; *Burks v. United States*, supra, 437 U.S. at 15-18.)

> The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E.g., *Mullaney v. Wlbur [sic]*, 421 U.S. at 697-8, 95 S.Ct. at 1888-1889 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused). Under our system of criminal justice even *a thief* is entitled to complain that he

> has been unconstitutionally convicted and imprisoned as *a burglar*. (Emphasis added)

(*Jackson v. Virginia*, supra, 443 U.S. at 323-324.)

CONCLUSION

Petitioner qualifies under the 'actual innocence' gateway for relief from the one-year term of limitations. Petitioner's allegation that she is plainly innocent of capital murder on the face of the trial record has gone uncontested. Thus, she has also demonstrated that her conviction should be vacated and that the State of Texas should be directed to enter a judgment of acquittal as to capital murder. Ground #1 satisfies both the *Jackson v. Virginia* and *Murray v. Carrier* standards. This is "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent" and, therefore, "a federal habeas court may grant the writ . . . ". (*Schlup v. Delo*, supra, 513 U.S. at 321 [quoting *Murray v. Carrier*, supra, 477 U.S. at 496.)

January 13, 2002

Respectfully Submitted,

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PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the City of San Bruno, that I am over the age of eighteen (18) years and not a party to the within cause; that I am an active member of the State Bar of California; that my business address is 305 San Bruno Avenue West, San Bruno, California; and that on the date set out below I deposited a true copy of the attached documents, listed below, on the parties to the action by one or more of the following methods:

[XX] First Class Mail

[ ] Fax via ( )

– by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at San Bruno, California;

Documents Served: PETITIONER'S OBJECTION UNDER 28 U.S.C. { 636(b) TO THE MAGISTRATE' JUDGE'S MEMORANDUM AND RECOMMENDATION AS ENTERED 12/01/01

Party Served: KARYL KRUG, ESQ.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Bruno, California on January 13, 2002.

APPENDIX H

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

LORA LEE ZAIONTZ, Petitioner, vs. WAYNE SCOTT, Director of the Texas Criminal Justice Institutional Division, Respondent.	Case No.: 01-CV00172 PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS BY A STATE PRISONER (Filed Jul. 11, 2001)

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OVERVIEW

As an aid to the Court and opposing counsel, Petitioner Lora Lee Zaiontz preemptively explains her procedural standing through this brief.

I

THIS PETITION IS GOVERNED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA)

Petitioner's term of limitations under Title 28 of the United States Code section 2244(d) expired on April 24,

1997. Through this memorandum, petitioner presents her contention that she is entitled to a merits-determination of Grounds One (Insufficiency of Evidence) and Two (No Lesser-Included Jury Instruction) of the federal petition because she is innocent of the crime for which she was convicted. Petitioner contends that section 2244(d) does not diminish her right to a merits determination as to Ground Three (Eighth Amendment Violation) because that violation of her constitutional rights is ongoing, hence timely whenever made.

II

STATEMENT OF FACTS

A. Five Kids on Their Way to Corpus Christi.

Russell Stanley received a sentence of 30 years in exchange for his guilty plea to murder.(RT 221.)[1] Russell testified that on August 11, 1984 he was with Troy Kunkle, Tom Sauls, Aaron Adkins, and petitioner. They were all teenagers and they were all using the drug commonly known as "LSD". (RT 224-225, 298.) The group decided to go to the beach at Corpus Christi to party. (RT 263, 297.) Aaron drove. (RT 236.) Petitioner sat in the front seat, the remaining three sat in the back. (RT 236.)

On the way to Corpus Christi, Aaron and Russell talked about robbing someone. (RT 235-237, 301.) There was a gun in the car. It belonged to Aaron's mother. (RT 230-231.) At some point during the road trip, Russell fired

[1] RT refers to the reporter's transcript of the trial in this matter.

the gun out the window of the moving car. (RT 232, 266-267, 300.) According to Russell, once they reached the beach, Troy and petitioner walked by themselves, while Tom, Aaron, and he again discussed robbing someone. (RT 270-272.)

B. The Pay Phone Robbery.

After they left the beach, they drove to a convenience store in Corpus Christi. (RT 269, 275.) There, Aaron and Russell robbed "a man that was standing at the pay phone" in the back of the store. (RT 275-277.) It was Russell's idea.(RT 286.) Russell put the gun against the man's back, demanded the money, while Aaron actually took the money from the victim. (RT 275-277.) Russell then told the man to lay on his stomach. (RT 276.) The duo returned to the car, which was waiting in front of the store. With petitioner at the wheel, they then sped away. (RT 277, 287, 305-307.)

C. The Homicide.

The next significant event that Russell recalled was seeing Steven Horton walking in a field. (RT 237, 278-279.) Russell suggested that they rob him. (RT 238.) The others agreed. (RT 238-239.) Aaron, who was driving again, circled the car back and pulled up next to Horton. (RT 239-240.) Russell had the gun. Petitioner was in the passenger-side front seat. (RT 240.) She hung herself out the window and asked Horton if he wanted a ride. (RT 240, 310.) Horton declined, explaining that he lived just down the street. (RT 240.) Petitioner offered to give him a ride anyway. (RT 240-241, 290.) Horton got in. (RT 241.) Russell "pulled the gun on [Horton] and told him to give

[him] the wallet or [he'd] kill him." (RT 241, 280, 311.) Petitioner told Horton not to look at her and "constantly," kept her hand pressed against the left side of Horton's face so that Horton would not look at her or any of the other people in the car. (RT 344.) (See discussion at IT (D), infra.)

Horton's take on his situation was unusual – and tragic. He told Russell to "go ahead and kill [him], that he had been wanting to die for a long time". (RT 242, 311.) Russell again threatened to "shoot him if he did not give [him] the wallet". (RT 243-244, 280.) Troy told Russell to go ahead and shoot him. Russell refused. (RT 244.)

This impasse lasted for about five minutes, during which time Aaron had pulled behind a building and stopped the car. (RT 244-246.) Russell had kept the gun against the back of Horton's head throughout the exchange between him and Horton. (RT 245-246.) Troy then took the gun and shot the man. Troy explained his motive by saying that Horton had "said something smart to [petitioner]", who was his girlfriend. (RT 246.)

Aaron and Russell then started yelling at petitioner "to get the man out of the car". (RT 247, 346.) Petitioner opened the door and pushed Horton out. (RT 247-248.) The car had already started to roll slowly forward. Somebody told her to get Horton's wallet. She did so and gave it to Troy. (RT 248-249, 314-315, 347.) Troy gave the gun back to Russell. (RT 249.) Troy took the money out of the wallet and Russell threw the wallet out the window. (RT 250, 281.) Tom started to cry and whimper about the fact that they would be caught. (RT 251.) Russell threatened Tom with the gun, telling him to shut up. (RT 251, 280.) Petitioner intervened on Tom's behalf, asking Russell not to

shoot him. (RT 251.) Horton's money was spent on beer, which they all consumed. (RT 252, 282.)

D. The Wounds to Steven Horton's Right Eye.

Victor Summers discovered Horton's body in a field. He noted that there was a "swollen area on the right side of [Horton's] face around his eye and below his eye . . ." (RT 99-100.) Horton was lying on his right side. (RT 106.)

Dr. Parks, a pathologist, testified that when he "examined the body, there was an unusual arrangement of marks around his right eye", in the eye socket itself. (RT 129, 142, 144, 352.) Dr. Parks called these "punctate marks", further defining them as the sort of "very circumscribed" wounds that would result from sticking a "sharp object into the flesh". (RT 130.) The wounds in question were "very small". (RT 130.) There were approximately eight of them. (RT 133, 143.) According to the doctor, the wounds were produced while Horton's heart was still functioning, but this finding rested on the presence of what he called a "very early blood clot present on these wounds". (RT 142.)

Dr. Parks admitted to finding the wounds "very puzzling" and declined to theorize as to how the wounds were inflicted. (RT 142.)

Russell Stanley testified that after Horton got into the car, petitioner told him not to "turn around and look at her". (RT 241.) Petitioner was sitting on his left. When he tried to look at her, she pushed his face so that he was again looking straight forward. (RT 242.) Tom testified that petitioner's hand was "constantly" on Horton's face. (RT 344.) Aaron also pushed the man's face once. (RT 284.)

Tom said that petitioner was sitting to the left of the victim, using her right hand on the victim's *left* cheek. (RT 344.) He said her nails were on the left "side of the guy's face", and that she was not poking them into either of Horton's eyes. (RT 343-344.) Horton asked why "the chick" had her nails "dug in the side of his face". (RT 312, 344.) This may have been the "smart remark" which Troy offered as justification for shooting Horton. (See RT 246.)

Recalled to the stand, Dr. Parks testified that there were no wounds or fingernail marks of any type on the left side of the victim's face. (RT 352.)

E. Dariel Thomas Souls ("Tom").

For the most part, Tom corroborated the story told by Russell Stanley. There were, however, some discrepancies between their stories. First, in Russell's version, Tom expressed agreement with, and participated in, the robbery plans. (RT 239, 271, 280, 313-314.) In Tom's version, he had consistently objected to the robberies as they were being planned. (RT 300-301, 305-306, 308-309, 337, 339-340.) Second, in Tom's version, Troy snatched the gun out of Russell's hands before Aaron drove the car behind the abandoned building where Horton was shot. (RT 312-313.) Third, Tom did not recall any discussion between him, Aaron, and Russell on the beach in Corpus Christi about robbing someone. (RT 334-335, 338.) Nor did he recall an attempt to break into a car parked near the beach. (RT 334-335, 338.) Russell's testimony contradicted Tom's on these points. (RT 270-271.) Fourth, in Tom's version, Russell did not threaten to kill Horton. (RT 342.) Tom just recalled Russell demanding the wallet after he announced that this was no joke or "little kid's game". (RT 342.) Fifth,

Tom recalled that Troy, after snatching the gun from Russell, told the man, "If you don't give me your wallet right now, I am going to blow your head off". (RT 343.)

Probably the most important testimony Tom offered concerned the reaction of the group to the shooting. He testified that Aaron immediately remarked: "What did you shoot that guy in my car for?" (RT 345.) Russell "just looked astonished". (RT 345.) Tom was also "astonished by everything that happened". (RT 346.) Tom "didn't think [Horton] was going to be shot". Indeed, Tom opined that "*no one thought [Horton] was going to be shot*".(RT 346.)

Tom was never charged or arrested in connection with the homicide. (RT 320-321.)

F. The State's Closing Argument.

Both of the prosecutor's [sic] assigned to the case had an opportunity to give a closing argument. The most telling aspect of their arguments is that they *never once* asserted that they had proven the intent requisite to Capital Murder under Texas law. To be more specific, they *never once* asserted that they had proven petitioner knew of the intent of Troy to kill the victim and that petitioner acted with intent to promote or assist the homicide by encouraging, directing, aiding or attempting to aid, Troy in the shooting. (See RT 390-394, 423-437 [their full summations].) Yet, this was the essential part of their burden on the charge for which petitioner stands convicted. (See

Texas Penal Code {{ 7.02(a)(2), 19.03(a)(2); CT 56-57[2] [the relevant jury instructions; see also *Fincher v. State* (1998) 980 S.W.2d 886, 888; *Duke v. State* (1997) 950 S.W.2d 424, 427; *Lawton v. State* (1996) 913 S.W.2d 542, 555 [all three Texas cases holding that before a defendant may be convicted of capital murder based upon the conduct of another, it must be proven beyond a reasonable doubt that said defendant harbored the specific intent to promote or assist in the commission of that intentional murder].)

With respect to their version of the facts, the prosecutors focused on "five acts" committed by petitioner:

(1) Petitioner lured Horton into the car (RT 424);

(2) Petitioner kept "slapping" Horton's face so that "she could not be identified" (RT 424);

(3) Petitioner opened the door and pushed Horton out of the car (RT 424-425);

(4) Petitioner asked Aaron to slow the car down and took Horton's wallet (RT 425); and

(5) She retrieved the wallet. (RT 425.)

These "five acts", according to the prosecutors, proved she was "a willing participant" in the "robbery". (RT 427.) "Look at the young woman's state of mind when she is the getaway driver, when she knows a robbery is going to occur. . . ." (RT 432.)

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[2] CT refers to the clerk's transcript of the proceedings in this matter.

Neither of the prosecutors ever argued that petitioner was an intentional or knowing aider and abettor of murder. It was never asserted that she knew Troy would actually shoot Horton or that any of her actions were done with the expectation of assisting Troy in killing Horton. (RT 390-394, 423-437.) In this way the summation of the State's representatives mirrored the evidentiary gaps in their case in chief.

III

THE LAW OF THE MISCARRIAGE OF JUSTICE EXCEPTION

With respect to a prisoner's federal habeas corpus petition, the United States Supreme Court has held that, absent a showing by the prisoner of "cause and prejudice", federal court may not ordinarily avoid several types of procedural bars – including the bar imposed with respect to "successive" or "abusive" claims in a second or subsequent petition and those attendant to claims barred on state procedural grounds – and reach the merits of the prisoner's federal constitutional claims. The United States Supreme Court, however, has also recognized that the procedural bars which it has seen fit to recognize, have an "actual innocence" exception, sometimes known by other names such as the "fundamental miscarriage of justice" exception. In *Murray v. Carrier* (1986) 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639, the Court held that in order to invoke this exception, a federal habeas petitioner is required to show that a constitutional violation has "probably" resulted in the conviction of one who is actually innocent.

In *Schlup v. Delo* (1995) 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct. 851, the Court held that the rule of *Murray v. Carrier* ('the *Carrier* standard') for defaulted constitutional claims would also allow a demonstration of innocence based on evidence not presented at trial to act as a 'procedural gateway' for defaulted claims. (*Id.* at 513 U.S. 315, 130 L.Ed.2d 828.)

IV

THE MISCARRIAGE OF JUSTICE EXCEPTION CAN ALSO REVITALIZE CLAIMS THAT ARE TIME-BARRED UNDER TITLE 28 U.S.C. SECTION 2244(d)

In *United States v. Zuno-Arce* (C.D. Cal. 1998) 25 F.Supp.2d 1087, 1099, the Central District of California held that the Miscarriage of Justice exception (hereinafter "MOJ") also applies to Title 28 of the United States Code section 2244(d)[3]. Petitioner adopts the *ratio decidendi* of that case in toto.

Petitioner contends that a failure to reach the merits of her claims, given her innocence of Capital Murder, would violate the Suspension Clause of the United States Constitution and her implicit right to due process in relation to this habeas application. (See U.S. Const., Art I, sec. 9, clause 2; U.S. Const., 5th Amendment, 14th Amendment [due process].) Also, petitioner contends that

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[3] There have been several cases that have discussed but stopped short of actually deciding the issue of, whether the MOJ exception applies to the one-year term of limitations. (See *Molo v. Johnson* (5th Cir. 2000) 207 F.3d 773, 775; *Miller v. Marr* (10th Cir. 1998) 141 F.3d 976, 978; *Lucidore v. N.Y. State Division of Parole* (2nd Cir. 2000) 209 F.3d 107,113; *In re Dorsanvil* (3d Cir. 1997) 119 F.3d 245, 248.)

if section 2244(d) is construed to bar federal habeas relief to petitioner, that the law violates Article I, section 8, clause 18, of the United States Constitution as, in that respect, it is neither "necessary" nor "proper" for carrying into execution the powers of Congress. Leaving a person under restraint of a life sentence arising from a trial in which *only contrary* evidence was presented with respect to the defining element of the offense, is wholly inconsistent with America's conception of ordered liberty and fundamental fairness.[4]

V

APPLICATION OF TITLE 28 U.S.C. SECTION 2244(d) TO BAR ADJUDICATION OF PETITIONER'S CLAIMS WOULD ALSO VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AMENDMENT

In *Triestman v. United States* (2nd Cir. 1997) 124 F.3d 361, 378-379, the Second Circuit observed that denial under the AEDPA of collateral review to a party claiming actual innocence could raise serious Eighth Amendment

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[4] See Declaration of Rights, Congress at Philadelphia, October 14, 1774 [asserting that the inhabitants of the English Colonies in North America are "entitled to life, liberty . . ."; *Declaration of Independence*, adopted in Congress, July 4, 1776 ["We hold these truths to be self-evident . . . that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."]. Therefore, society gains no right to continue to alienate a citizen's liberty merely because the citizen has failed to file a federal petition establishing that the State's proof actually exonerated her of the charge for which she was convicted at some earlier point in time. Put another way, the type of unlawful restraint of liberty at issue in this case, does not become more legitimate with the passage of time.

and due process questions. Petitioner adopts that analysis here.

The continued incarceration of a person on capital murder charges when, on the face of the trial record she was proven innocent of Capital Murder is, fortunately, unusual in the United States and it is also self-evidently cruel. In such a case society's responsibility to rectify its wrong is far greater than in cases where a freestanding claim of innocence based upon evidence outside the trial records is leveled. (See *Schlup v. Delo* (1995) 513 U.S. 298, 313-316, 130 L.Ed.2d 808, 828, 115 S.Ct. 85 [discussing the holding in *Herrera v. Collins* (1993) 506 U.S. 390, 122 L.Ed.2d 203, 113 S.Ct. 853.) Where a petitioner concedes that his trial was constitutionally sound, but contends that evidence outside the trial record has become available to him proving his innocence, society's responsibility to restore his liberty is not as great as where constitutional error has probably resulted in the conviction of someone who is legally innocent. (*Schlup*, supra, at 513 U.S. 315-316, 328-329, 130 L.Ed.2d 836-837.)

VI

GROUND #3 OF THE FEDERAL PETITION (EIGHTH AMENDMENT VIOLATION) INVOLVES AN "ONGOING" VIOLATION OF PETITIONER'S RIGHTS UNDER THE EIGHTH AMENDMENT

The United States Supreme Court has explained that the sufficiency of evidence standard of *Jackson v. Virginia* (1979) 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781, is more rigorous than the *Carrier* MOJ exception in two ways:

> "First, under *Jackson* the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we described today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments. Second, and more fundamentally, the focus of the inquiry is different under *Jackson* than under *Carrier*. Under *Jackson*, the use of the word "could" focuses the inquiry on the Power of the trier of fact to reach its conclusion. Under *Carrier*, the use of the word "would" focuses the inquiry on the likely behavior Of the trier of fact."

(*Schlup v. Delo* (1995) 513 U.S. 298, 330, 130 L.Ed.2d 808, 838, 115 S.Ct. 85.)

Thus the fact that petitioner can satisfy both the *Carrier* MOJ exception and the *Jackson* standard is a truly extraordinary[5] demonstration. By petitioner's proof under *Jackson*, petitioner demonstrates the lack of "power of the trier of fact to reach its conclusion". (*Ibid.*) By petitioner's proof under the *Carrier* standard, petitioner demonstrates "actual innocence" as defined in *Schlup*, supra. By demonstrating a travesty encompassing both standards, petitioner's sentence is revealed as a condition that shocks the conscience. Petitioner, proven innocent of

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[5] Compare *Schlup v. Delo* (1995) 513 U.S. 298, 322, 130 L.Ed.2d 808, 833, 115 S.Ct. 85: "Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extra-ordinary case', *Carrier*, 477 U.S. at 496, 91 L.Ed.2d 397,106 S.Ct. 2639."

Capital Murder by the State's own case, has nonetheless languished in prison for 16 years under a sentence which the trier of fact lacked lawful "power" to enter. Nor should anyone suggest that this travesty is somehow mitigated by the fact that petitioner is not wholly blameless. As noted by the United States Supreme Court in *Schlup*, supra, though the MOJ exception is often billed as requiring a demonstration of 'actual innocence', the focus is really on *legal* innocence:

> "*Carrier* requires a petitioner to show that he is 'actually innocent' . . . [Nonetheless] [T]he *Carrier* standard reflects the proposition, firmly established in our legal system, that the line between innocence and guilt is drawn with reference to a reasonable doubt. See, *In re Winship* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, (1970). Indeed, even in *Sawyer*, with its emphasis on eligibility for the death penalty, the Court did not stray from the understanding that the eligibility determination must be made with reference to reasonable doubt. Thus, whether a court is assessing eligibility for the death penalty Under *Sawyer*, or is deciding whether a petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence."

(*Schlup* supra, at 513 U.S. 327, 328, 130 L.Ed.2d 837.)

Thus the crux of this inquiry remains petitioner's innocence of Capital Murder and not her possible guilt under other theories, such as felony murder, for which she has *never* been tried.

In petitioner's view, the continued incarceration of one who can, on the trial record alone, meet both the *Carrier* and *Jackson* standards constitutes an *ongoing* violation of the Eighth Amendment.

VII

ALTHOUGH GROUND #3 WAS NOT PRESENTED IN THE STATE OF TEXAS, THE STATE DENIAL OF GROUND #1 EXHAUSTED PETITIONER'S REMEDIES WITH RESPECT TO IT

Ground #3 (Eighth Amendment Violation) is only viable if Ground #1 (Insufficiency of Evidence) has merit. The state court's denial of Ground #1 makes certain that they would have also rejected Ground #3. This is sufficient to satisfy the federal exhaustion rule. (See Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure* (3rd Ed. 1998 & 2000 Supplement, Lexis Press), § 23.4a, fn. 18 [citing cases]; see also *Bear v. Boone* (10th Cir. 1999) 173 F.3d 182, 785 [ruling by state's highest criminal court necessarily encompassed rejection of position petitioner was advancing in federal habeas corpus petition].) Ground #3 is presented because of its potential procedural significance and because it is obviously meritorious.

CONCLUSION

For the above reasons, the petition should be considered timely and addressed on its merits.

May 18, 2001

Respectfully Submitted,

/s/ William E. Gilg
WILLIAM E. GILG,
Attorney for Petitioner

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the City of San Bruno, that I am over the age of eighteen (18) years and not a party to the within cause; that I am an active member of the State Bar of California; that my business address is 305 San Bruno Avenue West, San Bruno, California; and that on the date set out below I deposited a true copy of the attached documents, listed below, on the parties to the action by one or more of the following methods:

[XX] First Class Mail

[ ] Fax via( )

– by, placing a true copy thereof enclosed in a sealed envelope with postage thereon fully pre-paid in the United States Mail at San Bruno, California;

Documents Served: *PETITION FOR WRIT OF HABEAS CORPUS, POINTS & AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS*

Party Served: Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Bruno, California on May 18, 2001.

APENDIX I

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241 (Rev. 5/85)

United States District Court	District Southern District of Texas	
Name Lora Lee Zaiontz	Prisoner No. TDCJ#: 392303	Case No.

Place of Confinement

Texas Dept. Criminal Justice, Murray Unit,
1916 North Hwy 36 Bypass,
Gatesville, Texas 76596 (Filed Apr. 16, 2001)

Name of Petitioner (include name under which convicted)	Name of Respondent (authorized person having custody of petitioner)
LORA LEE ZAIONTZ	V. WAYNE SCOTT, Director Texas Dept. of Criminal Justice Inst. Div.,

The Attorney General of the State of:
Texas

PETITION

1. Name and location of court which entered the judgment of conviction under attack The District Court of Nueces County, Texas, 28th Judicial District
2. Date of judgment of conviction February 11, 1985
3. Length of sentence Life Sentence
4. Nature of offense involved (all counts) Capital Murder (P.C. § 19.03(a)(2)), Use of Deadly Weapon

5. What was your plea? (Check one)

(a) Not guilty ☒

(b) Guilty ☐

(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

_____

_____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒

(b) Judge only ☐

7. Did you testify at the trial?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court Court of Appeal, 13th Supreme Jud. Dist., Corpus Christi

(b) Result Affirmed (with modification deleting use of deadly weapon finding

(c) Date of result and citation, if known Lora Lee Zaiontz v. The State of Tx., 710 S.W. 152 (May 1, 1986)

(d) Grounds raised (a) Failure to Instruct that Tom Sauls was an accomplice; (b) Insuff of Evid. to Corroborate Accomplice Sauls; (c) Deadly Weapon finding erroneous

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court _____

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court District Court of Nueces County, Texas, 28th Jud. Dist.

(2) Nature of proceeding Petition for Writ of Habeas Corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure.

(3) Grounds raised (1) 14th Amend. (Due Process) violation by insufficiency of evidence to establish 'intentional and knowing' element of Capital Murder; (2) violation of 6th Amend. right to Effective Appellate Couns

[sic] (Re: failure to raise preceding issue); (3) 14th Amend. (Due Process) violation by failure to instruct jury on lesser-included of felony-murder; (4) Violation of 6th Amend. right to Effective Trial Counsel by failure to request instruction to the jury on lesser-included of felony-murder.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Denied

(6) Date of result August 31, 1995

(b) As to any second petition, application or motion give the same information:

(1) Name of court Texas Court of Criminal Appeals

(2) Nature of proceeding Petition for Writ of Habeas Corpus pursuant to Atricle [sic] 11.07 of the Texas Code of Criminal Procedure

(3) Grounds raised Same as stated in answer to 11(a)(3), *ante*.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Denied.

(6) Date of result October 18, 1995

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☒ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted you [sic] state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(h) Denial of right of appeal.

A. Ground one: PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED BY HER CONVICTION ON EVIDENCE INSUFFICIENT TO ESTABLISH THAT SHE HAD THE STATE OF MIND REQUISITE TO CAPITAL MURDER UNDER TEXAS LAW.

Supporting FACTS (state *briefly* without citing cases or law) (*See*, following page.)

B. Ground two PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED BY THE FAILURE TO INSTRUCT THE JURY ON

THE LESSER INCLUDED OFFENSE OF FELONY-MURDER UNDER TEXAS P.C. § 190.2(B)(3).

Supporting FACTS (state *briefly* without citing cases or law) (*See*, following page.)

FACTS SUPPORTING GROUND #1:

(*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781)

(1) In order to prove Capital Murder under Texas Penal Code sections 7.02(a)(2) and 19.03(a)(2), the State had to prove beyond a reasonable doubt that Petitioner both knew of the intent of Troy Kunkle (the shooter) to kill the victim and that she acted with intent to promote or assist the commission of the offense by encouraging, directing, aiding or attempting to aid Troy in the shooting. The jury was so instructed.

(2) No rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found that the requisite intent had been proved beyond a reasonable doubt.

(3) The evidence the State presented regarding Petitioner's intent and state of mind was, at best, to the effect that she was a knowing and willing participant in robbery; that she expected the victim to survive the robbery and took action to prevent him from being able to later recognize her; that she had her hand in the line of fire when the victim was shot; that all the relevant discussions of the day were about robbing people; that none of said discussions involved shooting or killing anyone; that two of her male accomplices had robbed a man without shooting him earlier that day; that the person who was armed at the time Petitioner invited the victim into the car refused to shoot him – even though the victim himself invited him to do so; that no one expected Troy to

grab the gun; that Troy shot Horton as a spontaneous reaction when the victim insulted Petitioner (who was his girlfriend); that no one expected murder would occur during the robbery; and that the reaction in the car when Troy shot the man was disbelief and surprise.

(4) The Constitutional error described above has probably resulted in the conviction of one who is innocent of Capital Murder.

FACTS SUPPORTING GROUND #2:

(*Beck v. Alabama*) (1980) 447 U.S. 625, 627, 100 S.Ct. 2382)

(1) Under Texas law felony-murder is a 'lesser included' offense of Capital Murder. (P.C. { 19.02(b)(3), 19.03; *Rousseau v. State* (Tex. Crim.App. 1993) 855 S.W.2d 666, 673.)

(2) The difference between the two offenses is that with felony-murder the culpable mental state is supplied by the mental state accompanying the underlying felony. (*Ibid.*)

(3) Texas law requires instruction on 'lesser included' offenses (*State v. Royster* (Tex. Crim.App. 1981) 622 S.W.2d 442, 444.)

(4) Although the jury was instructed on Capital Murder (under P.C. { 19.03(a)(2)) and First Degree Murder (under P.C. { 19.02(b)(1)), the evidence was insufficient to support both theories within the meaning of *Jackson v. Virginia*, (1979) 443 U.S. 307, 99 S.Ct. 2781. The jury was not instructed on any other theory of "criminal homicide." (See P.C. { 19.01.)

(5) Petitioner asks that Ground #1, facts one to three, be incorporated herein by reference.

(6) The most serious charge that the State's case potentially supported was felony-murder, but the jury was not instructed on it.

(7) The constitutional error described above has probably resulted in the conviction of one who is actually innocent of capital murder. (See *Murray v. Carrier* (1986) 477 U.S. 478, 106 S.Ct. 2639.)

C. Ground three: PETITIONER'S ONGOING INCARCERATION FOR CAPITAL MURDER WHEN THE TRIAL RECORD ESTABLISHES THAT THE RELEVANT STATUTE DID NOT PROHIBIT HER CONDUCT IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE 8TH AMENDMENT.

Supporting FACTS (state *briefly* without citing cases or law) (1) Petitioner reasserts facts 1-4 of Ground #1. (2) The U.S. judicial system is designed to prevent the incarceration of citizens under color of statutes they did not violate. As a result, Petitioner's circumstances are highly unusual. (3) It [sic] self-evidently cruel to confiscate the life of a person under authority of a statute which they did not violate. Petitioner's incarceration under the harsh life term associated with Texas Capital Murder shocks the conscience. That term is only supposed to be meted out to those who either intentionally murder or who knowingly aid one who does in certain qualifying circumstances. (4) Petitioner reasserts the facts of Ground #2.

D. Ground four: N/A

Supporting FACTS (state *briefly* without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or

federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing Ron Barroso, 3649 Leopard St., Suite 412 Corpus Christi, TX 78408

(b) At arraignment and plea David Diaz, 809 South Port, Corpus Christi, TX

(c) At trial Ron Barroso (*see*, 15(a), *ante*) and J. Manuel Banales (same address as Barroso)

(d) at sentencing Same as 15(c), *ante*.

(e) On appeal J. Manuel Banales (again)

(f) In any post-conviction proceeding Paul A. Hampel, 13030 Park Crossing Dr. #206, San Antonio, TX 78217

(g) On appeal from any adverse ruling in a post-conviction proceeding Same as 15(f), *ante*.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: ___

(b) Give date and length of the above sentence: ___

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Cal. State Bar #: 151991
S. Dist. Texas Bar #: N.A.
FAX 650-873-3168
OFFICE 650-871-8647

/s/ William Gilg
Signature of Attorney (if any)
William Gilg, Attorney-in-charge
305 San Bruno Ave West, San Bruno, Ca 94066.

I declare under penalty of perjury that the foregoing is true and correct. Executed on.

April 6, 2001
(date)

/s/ Lora Zaiontz
Signature of Petitioner